United States Court of Appeals
for the Second Circuit

APPENDIX

77-7037

In The

United States Court of Appeals

For The Second Circuit

B

NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
FILED
AUG 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX - VOLUME 15

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PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL AUTO BROKERS CORP., et al., : 70 Civ. 5421A (TPG)

Plaintiffs, : AFFIDAVIT UNDER 28 USC §144

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK MAIORANA, being duly sworn, deposes and says:

1. I am a plaintiff and the President of National Auto Brokers Corp. ("Nabcor"), also a plaintiff in this action, am fully familiar with the facts stated herein, and make this affidavit under 28 U.S.C. § 144, to the effect that the judge before whom the above matter is now being tried has a personal bias or prejudice against affiant and the other plaintiffs and has a personal bias or prejudice in favor of defendant General Motors Corporation and the other defendants.

2. On Monday, November 22, 1976, my attorney, Carl E. Person, advised me that he had obtained information from an associate attorney of Messrs. Davis, Polk & Wardwell that such firm represented General Motors Corporation at the time that Thomas P. Griesa terminated his partnership interest in the law firm and became a federal judge, in 1972. Shortly thereafter, Judge Griesa was assigned this case (before any severances) as

the single judge for the case. No disclosure of the law firm's representation of General Motors Corporation had been made to me at any time until November 22, 1976, at which time I requested my attorney to move for a mistrial and for Judge Griesa to disqualify himself. This motion was made on Tuesday, November 23, 1976, and was denied in its entirety by Judge Griesa, who first stated that he personally had worked on a matter for General Motors Corporation and had signed an opinion letter for General Motors Corporation (in a matter which Judge Griesa advises was unrelated to this action).

3. I have been advised by my attorney that he had heard from a party in a suit against General Motors Corporation pending from about 1949 to 1953 (the automatic transmission case) that Messrs. Davis, Polk and Wardwell represented General Motors Corporation, but this information was the only information which my attorney had relating to this firm's representation of General Motors Corporation.

4. The nature of my present action against General Motors Corporation makes it imperative that Judge Griesa disqualify himself and declare a mistrial. The action is not a typical action, but one which could and should result in a determination that General Motors' distribution system is illegal *per se* and should be prohibited from being used any further, by appropriate injunctive relief sought by plaintiffs. Such injunctive relief is discretionary, and the exercise of such discretion could well be adversely affected by Judge Griesa's prior relationship with General Motors, through Davis, Polk & Wardwell.

5. The name of the person who advised affiant's counsel about the 1949-53 litigation is Joe Gidding, formerly of 111 E. 64th Street, New York, N.Y., who died several months ago, according to my counsel. He claimed that he was the inventory of the automatic transmission, and settled his action against General Motors Corporation for about $18,000,000, according

to my counsel. Inasmuch as the action terminated about 23 years ago, the matter was not deemed significant until affiant learned about the continued representation of General Motors by Davis, Polk & Wardwell.

6. My attorney advises me that Judge Griesa is reported to have become associated with Messrs. Davis, Polk & Wardwell during 1962, approximately, and was reported to be a partner in such firm no later than 1971, continuing into 1972. See Martindale-Hubbell listings as follows: 1962, Vol. II NYC P. 2115; 1963, Vol. II NYC p. 2246; 1964, Vol. II NYC p. 2378; 1965, Vol. II NYC p. 2507; 1966, Vol. II NYC p. 1199; 1967, Vol. II NYC p. 1256; 1968, Vol. III NYC p. 504; 1969, Vol. III NYC p. 524; 1970, Vol. III NYC p. 542; 1971, Vol. III NYC p. 562; 1972, Vol. III NYC p. 577.

7. Judge Griesa has repeatedly called affiant a liar (or words to such effect) on the record, during the 1973 hearing on plaintiffs' preliminary injunction motion; during the October, 1976 preliminary hearing on the issue of admissibility of hearsay testimony; and during the present trial. Although none of these statements was made in front of the jury, the Judge's instructions to the jury made it quite clear that the jury was to look very carefully at the credibility of plaintiffs and their witnesses, with no similar direction concerning defendants' witnesses (who also have an interest in the outcome of the case and their testimony because of their relationship with General Motors as franchisee or employee, now and in the future).

8. Also, Judge Griesa has stated that the plaintiffs' case is a thin tissue of lies (outside of the presence of the jury); that plaintiff's counsel is either incompetent or wilfully misleading the court; that plaintiffs' witness Donald Bolling was an embezzler for absolutely no reason whatever (other than a lack of knowledge of industry practices). At the same time, Judge Griesa has failed to permit plaintiffs to call General Motors Corporation as a witness in a critical part of the case (relating to fleet allotments,

retail allotments and delivery delays, as well as in a variety of other areas with a prior subpoena duces tecum served during the trial. During pre-trial, Judge Griesa vacated numerous discovery notices and requests thereby preventing plaintiffs from obtaining needed information from General Motors Corporation and the other defendants, and failed to take into account the differing economic abilities of plaintiffs and General Motors.

9. Also, during the trial, Judge Griesa took over questioning of witnesses and attempted to or succeeded in getting them to change testimony favoring plaintiffs (Robert Dillon, Earl Stewart, Clarence Urso and Dale Strimple, without being exclusive).

10. In fairness, Judge Griesa's prior representation of General Motors Corporation could well have led Judge Griesa to a prior conclusion that General Motors is always lawful in what it does, and that plaintiffs are erroneous in their allegations and testimony. But this amounts to prejudice and bias against affiant and plaintiffs, and in favor of General Motors Corporation and the other defendants. Plaintiffs' right to a fair trial has been affected substantially, and a mistrial should be declared; also, Judge Griesa should immediately disqualify himself as judge, and another judge should be appointed in his place.

11. Nothing in this affidavit should be construed, directly or indirectly, to impugn the integrity of Judge Griesa. Prejudice or bias often exists without the full awareness of the person with a bias or prejudice. The remedy is to declare a mistrial and to appoint another judge.

12. Another reason in support of the request for a mistrial and appointment of another judge is that, as my attorney points out, there is a developing tendency for judges to leave their federal judgeships and return to the private sector, usually a major law firm, because of comparatively low compensation for federal judges. Unless Judge Griesa were to remove himself,

it would be entirely possible that Judge Griesa could have never-ending involvement with General Motors, as follows: 1) attorney for General Motors prior to becoming federal judge; 2) judge in a most important case with General Motors as a party (this action); and 3) attorney for General Motors after leaving the judiciary to join a major law firm (perhaps Davis, Polk or some other firm). Inasmuch as the latter is always a possibility, the continuous involvement possibility can only be broken by having Judge Griesa remove himself as judge in this action and having another judge appointed in his place.

WHEREFORE, affiant respectfully requests that Judge Griesa declare a mistrial and disqualify himself from presiding over any further proceedings in this action.

Frank Maiorana

Subscribed and sworn to before me
this 29th day of November, 1976.

Notary Public

IRA J. EHRLICH
NOTARY PUBLIC, State of New York
No. 31-4600212
Qualified in New York County
Commission Expires March 30, 19[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL AUTO BROKERS CORP., et al.
Plaintiffs,
-against-
GENERAL MOTORS CORPORATION, et al.,
Defendants.

-------------------------x

70 Civ. 5421A (TPG)

CERTIFICATE OF COUNSEL

CARL E. PERSON, attorney for the plaintiffs in the above-captioned action, does hereby certify that the foregoing application and affidavit of Frank Maiorana, sworn to November 29, 1976, under 28 U.S.C. § 144, has been made in good faith, and is not intended to delay the proceedings. The information attributed to the undersigned is true according to the undersigned's own knowledge and belief. The undersigned wants to make it clear that he is not impugning the integrity of Judge Thomas P. Griesa, who has had this massive action before him for many years, since 1972 (late) or early 1973. Instead, the undersigned believes that Judge Griesa is biased or prejudiced in fact and as a matter of law because of his activities in Davis, Polk & Wardwell prior to Judge Griesa's appointment as a judge, and because of such law firm's representation of General Motors, as described in the Maiorana affidavit. To give the appearance that plaintiffs are having their day in court, it seems essential that a mistrial be declared and another judge appointed in place of Judge Griesa.

Carl E Person

Carl E. Person

NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,

vs. 70 Civ 5 421A

GENERAL MOTORS CORPORATION,
et al.,
Defendants.

New York, November 29, 1976;
10.00 A.M.

Trial Resumed.

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(In the robing room)

MR. KAPLAN: We want to offer the statistical information this morning. Mr. Person and I spe
a good deal of time with it on Saturday. He has objections as to whether this is the approproate time to receive it. But before we complete the cross of Frank Maiorana we would just as soon offer it.

THE COURT: You feel it's inappropriate to put it in on the plaintiffs' case?

MR. PERSON: I feel it's inappropriate

to use those statistics for anything that would support their case. I think that they have to bring that in at the right time; that it can be construed favorably for me but not against me.

THE COURT: I think I touched on this last week.

By and large the plaintiff has the right to limit his case to things that he wants to put in. The defendants, of course, have a right to introduce exhibits that are relevant to cross-examination of the plaintiffs' witnesses.

Are these things going to be used in the cross-examination of Mr. Maiorana?

MR. KAPLAN: In the same sense that a lot of other documents have, that is, where we have had prior inconsistent statements we have just read them. He's not going to be asked questions about them. There is no need to. We could, of course, derive exactly the same material by keeping him on the stand for a week and asking him whether he got this car and that car, and compile it that way. This is just a convenience.

MR. PERSON: I can answer that and solve the problem. I've derived some statistical information from my own records and backed it up with theirs. I would like to offer that on the same time, that is on the delays, and I wouldhave no objection to including that since it's derivative of that information.

MR. KAPLAN: I don't know what he wants to offer.

MR. PERSON: I have shown it to you: Those two compilations which I handed to you two days ago, one saying 40 days or more delay and --

MR. KAPLAN: The two lists you gave me?

Your Honor, that's the listing that we took such violent objection to on Wednesday.

THE COURT: Mr. Person, the forms you gave me on Wednesday about the delays, were they derived from exhibits now in evidence?

MR. PERSON: They were derived from the logs, from my own compilations of the logs, and the deal folders, and their analysis of the logs and deal folders. It was a combination of cross checking and coming up essentially following the transactions that they have matched. I have not included transactions they didn't match in order to avoid controversy.

THE COURT: I would say this: On this claim about delays, after thinking about it over the weekend, it has certainly been a claim in the case.

I have not studied that material.

MR. PERSON: It's only a derivative of their material, your Honor.

THE COURT: It does seem to me that Mr. Person is entitled to argue that there was a pattern ofdelays. Maybe he will succeed and maybe he will not, but he certainly has, from the beginning, talked about delays.

I think the best way to handle it is to allow Mr. Person to put on the record what he contends is in evidence or is undisputable fact about delays. Then he can argue to me on a motion to dismiss. If he gets to the jury he can argue to the jury.

It may be persuasive and it may not be. But he's entitled to have the material in from which to argue. So I am not prepared to preclude Mr. Person from arguing the things that are shown in his sheets. I just don't think I could do that, despite the fireworks that we engaged in on Wednesday.

MR. PERSON: I wish to apologize.

THE COURT: I don't think anybody need start apologizing to anybody. Everybody is under stress at times.

Then subject to checks for accuracy, if

put in summaries or if you are offering summaries which are found at some point to need a correctionor two, naturally the corrections can be made, but, just a basic principle -- I think it sounds -- your offer of summaries or whatever is okay subject to check.

I assume from what you say you will not object to the General Motors offer of their summaries, again, always subject to mistake. If we find a mistake, you point out a correction, or anybody else, and that can be corrected. That's the way we'll leave it.

MR. PERSON: Your Honor, also, I prepared, in order to complete the request for a mistrial and for disqualification, an affidavit of prejudice which I wish to file. I have served it on the people. I'm doing this to complete the record. I think 144 may require the filing of an affidavit and that an oral motion may not be sufficient.

THE COURT: No problem about that.

(In open court; jury present)

MR. KAPLAN: Before we resume, your Honor, with Mr. Maiorana, we would like to offer in evidence the statistical material which we had referred to.

First of all we have Defendants' Exhibit S8 for identification, which is headed "Analysis of Nabcor-GM Transactions."

This, of course, is subject to any corrections that may need to be made.

THE COURT: Is there any objection to S8?

MR. PERSON: In accordance with what we have stated in the robing room, I have no objection.

(Defendants' Exhibit S8 was received in evidence)

xxx

MR. KAPLAN: Next, I offer Defendants' Exhibit T8 for identification into evidence, which is entitled "Summary of Orders Received by Nabcor as per Plaintiffs' Exhibit 450, for the period December 11, 1966 through December 10, 1970."

THE COURT: Same position?

MR. PERSON: Same thing.

THE COURT: Same ruling. Received.

(Defendants' Exhibit T8 was received in evidence)

xxx

MR. KAPLAN: Next, I offer Defendants' Exhibit U8 for identification, which is a schedule of entries in the order log which is Plaintiffs' Exhibit

450, which do not indicate any orders being made with a franchise dealer.

MR. PERSON: Same reservation.

THE COURT: Same ruling.

(Defendants' Exhibit U8 was received in evidence)

THE COURT: As to the five books --

MR. KAPLAN: We can rearrange them, your Honor.

THE COURT: Here are the books you want to have marked.

MR. KAPLAN: First, I would like to have marked for identification as Defendants' Exhibit A9 a book headed"Analysis of Nabcor Transactions, Cadillac."

MR. PERSON: No objection. Same basis.

THE COURT: Received.

(Defendants' Exhibit A9 was received in evidence)

MR. KAPLAN: Next I would like to have marked for identification as Defendants' Exhibit B9 and offered in evidence a book headed "Analysis of Nabcor transactions, Oldsmobile."

MR. PERSON: Same reservation.

THE COURT: Received.

(Defendants' Exhibit B9 was received in evidence)

xx

MR. KAPLAN: Next to be marked for identification and offered as Defendants' Exhibit C9, a book called "Analysis of Nabcor Transactions, Buick."

MR. PERSON: Same basis.

THE COURT: Same ruling. Received.

(Defendants' Exhibit C9 was received in evidence)

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MR. KAPLAN: As Defendants' Exhibit D9, a book headed "Analysis of Nabcor Transactions, Pontiac."

MR.PERSON: Same basis.

THE COURT: Received.

(Defendants' Exhibit D9 was received in evidence)

xx

MR. KAPLAN: Lastly, to be marked and offered as Defendants' Exhibit E9, a book headed "Analysis of Nabcor Transactions, Chevrolet."

MR. PERSON: Same basis.

THE COURT: Received.

(Defendants' Exhibit E9 was received in evidence)

xxx

THE COURT: Do you have some materials?

MR. PERSON: Yes.

THE COURT: Get that done.

MR. PERSON: I have Exhibits 714 and 715.

The first one, 714, is a schedule indicating delays in delivery to Nabcor, 40 days or more, which was drawn from various records in evidence, including the exhibits that have now been put in evidence. This refers to the time that Nabcor submitted the order to the GM dealer to the time that Nabcor took delivery of the car from the GM dealer.

THE COURT: According to our conference in the robing room that's received subject to any possible correction or check for accuracy.

(Plaintiffs' Exhibit 714 was received in evidence)

MR. PERSON: Exhibit 715 is delays in delivery to Nabcor in excess of 39 days, meaning 40 or more days, by broker.

THE COURT: All right.

MR. KAPLAN: May I inquire. I note the heading "Delays in Delivery," but as I understand it from the discussion we had over the weekend, these are not necessarily delays. This is the time lapse between some event and delivery.

MR. PERSON: That's correct.

MR. KAPLAN: What does it measure from?

MR. PERSON: The date that Nabcor submitted the order to the GM dealer to the time Nabcor took delivery of the car from the GM dealer. That period of time, 40 days or more, we refer to as a delay. But it's a period of time of 40 days or more.

(Plaintiffs' Exhibit 715 was received in evidence)

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THE COURT: Is there any more of this material to go in now?

MR. KAPLAN: Not at this time.

MR. PERSON: I have another thing, but it may require my own explanation. This is in reference to cancellations and some compilation.

THE COURT: Is there any more cross of Mr. Maiorana?

MR. KLEINBARD: I would just like to read from one of plaintifffs' exhibits, your Honor.

FRANK MAIORANA, resumed.

MR. PERSON: Your Honor, may I have a conference with my client for a second?

THE COURT: Yes, certainly.

(Pause.)

MR.KLEINBARD: I just wanted to read from Exhibit 468, and if your Honor wants to follow it I have a copy.

Ladies and gentlemen of the jury, I am reading from Nabcor Training Manual No. 1, which is Plaintiffs' Exhibit 468 in evidence.

It begins with an introduction "Welcome To The Nabcor System." I am going to skip down and read from page 1 of the introduction:

"The automobile business is slightly different from most other businesses. You cannot operate an automobile business in the same manner that most laymen expect a business to be run. There are certain peculiarities within the system itself that cannot be avoided. Automobiles are highly complex machines, which require approximately 12,000 parts."

Skipping down:

"Like any complex piece of machinery, there are some flaws. The manufacturer, in producing an automobile with 12,000 parts in as short a time as it takes to assemble an automobile, (anywhere from four to six weeks) has accomplished what is a near-miracle. A house, certainly, is not nearly as complex as an automobile, and could take six months to build. In the vast system that produces 9 million automobiles a year, there will be some imperfections. Nabcor cannot be any more perfect than the industry itself. There will be problems that you will encounter. In our training program we want to acquaint you with some of these problems."

Skipping down: "For example, you may" --

THE WITNESS: Your Honor, may I have a copy so I know what he is skipping down, because it may be relevant to what he is reading here?

MR. KLEINBARD: Your counsel has a copy. If not, we will lend you one of our copies.

Page 2 -- I am perfectly happy to read the whole thing.

"For example, you may order an automobile, and normal delivery may take from four to six weeks (you promised your customer this) but for some unknown reason, something in this vast, intricate, and almost perfect system broke down. Something in the computer system that has ordered all of the parts to be shipped to an assembly point from all over the country broke down with regard to this particular vehicle, or some other problem in this highly complex system caused this automobile to be rejected from the system. It has to go through the entire process again. This may cause a two, three, or even four-week delay. These are unusual situations; nevertheless, they can happen."

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"Now you have a highly irate customer who expected his car in four to six weeks. This automobile has taken two months or two and one-half months to deliver. Your normal deliveries may be only four weeks, but this one took longer. Consequently, you have a customer who is calling every day, making complaints, because you've promised him the automobile in four to six weeks, and he expects delivery. You prepare for this particular situation in this manner:

"When you take an order for the customer for an automobile, explain that normal delivery is six weeks. You feel 99.9 per cent sure that his car will come through in that time, but a problem may arise that may delay the car for a week or so. In so doing, you have prepared your customer, and if such a situation does occur you can always explain the delay by saying, 'Well, unfortunately, your particular case is one in a thousand, but there is a delay. We put a tracer on the automobile. We will try to find what has happened to this particular vehicle. We'll handle it as quickly as possible for you, but, unfortunately, there can be a delay. As I told you when we wrote this order, this does happen sometimes.' In most cases, the customer will be satisfied to wait until the car comes in."

That is all I have to read.

I have no further questions.

THE COURT: Any redirect examination?

MR. PERSON: Yes, your Honor.

MR. KLEINBARD: What was published in 1969. It says that on the face.

REDIRECT EXAMINATION

BY MR. PERSON:

Q I would like to show the witness Exhibits. 714 and 715. These are compilations of the amount of time that the record shows that it took orders by Nabcor for GM cars to be delivered from the GM dealer.

In the case of Exhibit 714 it is listed by consecutive order number from 82 over to 888, skipping those transactions where there was no length of time of 40 days or more.

Can you look through those numbers, please. Did Nabcor have any cancellations of automobiles by customers?

A Yes.

Q What reasons were there for some of these cancellations?

MR. KLEINBARD: I object, your Honor. I object to the statement of the reason which he has to get from somebody else.

THE COURT: I will overrule that objection.

MR. KLEINBARD: Also it is irrelevant, your Honor.

Q Can you approximate the percentage of cancellations that Nabcor received from its customers that were attributable to delays?

MR. KLEINBARD: Could I have that question again?

(Question read.)

MR. KLEINBARD: I object, your Honor. We have exhibits which recite the total number of cancellations, and I don't see how this man can recite from recollection anything beyond what is in the exhibit.

Q Can you recall instances where cancellations by customers were not a result of delays?

A I can't. In most cases, in the great majority of cases, the cancellations were as the result of delays.

You have delays here 70 days, 80 days.

There were additional cancellations for orders that our broker had in hand which were waiting for delivery of automobiles which we didn't get, which are not reflected in the log. They were never sent in to us --

MR. KLEINBARD: I move to strike that.

THE COURT: It is stricken. Strike the testimony about orders in hands of brokers which were not ever sent in to Nabcor.

Q Did you have discussions with any brokers concerning delays in deliveries of vehicles by Nabcor to the broker or the broker's customer?

A What was that again?

Q Did you have discussions with any of the Nabcor brokers concerning delays in deliveries of cars to the broker or the broker's customer?

A Yes.

Q Was a broker able to function efficiently under the Nabcor system if car deliveries to the broker were delayed to any substantial extent?

MR. KLEINBARD: I object, your Honor.

THE COURT: Overruled.

A Absolutely not, he could not function efficiently.

Q In cross-examination there was reference to Augustine Motors and the fact that Augustine Motors continued to deal as a Nabcor franchisee.

Do you know what happened to Augustine Motors when it terminated its relationship with Nabcor as you had described in your direct examination?

A Yes, sir. It wasn't able to --

Q Do you know what happened to Augustine at that time?

MR. KLEINBARD: Can I ask that the question be rephrased? It assumes --

Q Did anything happen to Augustine at the point when you have testified that Augustine terminated its franchise relationship? The word "terminate" is the dealings --

MR. KLEINBARD: I have no objection to not placing any further orders, but to terminate involves a conclusion.

THE COURT: That is his testimony. I assume it is his testimony.

We can look back at the notes; but let me what was said about Augustine.

Augustine was Tedesco's company?

THE WITNESS: Yes.

THE COURT: He testified on direct examination Tedesco ceased.

MR. KLEINBARD: Ceased to be a franchisee.

THE COURT: Whatever he is speaking of, you want to know what happened. This is in the Spring of 1967?

Q Do you know what happened to Augustine at that point?

A Yes. He had several cars on order which he wasn't getting and in fact we got a car from A.C. Chevrolet that was so bad, it was a demonstrator, that it was returned, and his sister was helping him with the business and I believe they wrote us a letter to the effect they had so many orders they weren't getting and I spoke to Tedesco himself and he told me he had --

MR.KLEINBARD: I object to that.

THE COURT: Wait a minute. This is purely hearsay. He said that Tedesco had some orders that he was not getting, which is probably hearsay, but there wasn't any objection.

He said they got a demonstrator from A.C.

Chevrolet that was very bad.

Now, I don't think I can upon objection let him go and say what Tedesco said to him. Tedesco could be called as a witness; he hasn't been.

You got the point across.

Q Do you know if Augustine became a franchisee of Nabcor of East New York?

A Yes. When I gave the distributorship for the New York area there were about 22 brokers and there were maybe just two or three that were active and Tedescro was one of them and I gave it to Turco to revitalize the system because I had lost a lot of credibility with the brokers and Tedesco did deal with Turco, although he stopped dealing with Nabcor. He did deal with Nabcor East.

Q The log shows or Goldfeder, another one mentioned, that the transaction 83-11 and between 83-12 there was a seven-month delay. That is a seven-month gap between those two orders for Goldfeder.

Do you know if Goldfeder became a franchisee of Nabcor of East New York?

A Yes.

MR. PERSON: No further questions.

THE COURT: Anything further?

MR. KLEINBARD: No further questions.

THE COURT: You may step down, Mr. Maiorana.

(Witness excused.)

THE COURT: Next witness or the depositions, whatever you have.

MR. KLEINBARD: Can we see you just a second?

(At the side bar.)

MR. KLEINBARD: As I understand, Mr. Person is going to read from several depositions. I believe he has already stipulated with Mr. Kaplan as to the relatively few pages.

Will your Honor be hearing motions to dismiss tomorrow?

THE COURT: I have to talk about that. Will these depositions conclude your case?

MR. PERSON: I think we will conclude today, your Honor.

THE COURT: Let's talk at the recess about the motions.

MR. KLEINBARD: Because it affects what I do for the balance of the day, that is the only reason.

If we are going to hear them tomorrow,

your Honor would not object to my being excused so I can prepare and get the motions for tomorrow.

MR. PERSON: Is it oral or in writing, your Honor?

THE COURT: Why don't you stay until the recess and we will talk about it.

MR. KLEINBARD: All right.

(In open court.)

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MR. PERSON: We are back to the Rock deposition. At the Court's request we will try to reduce this to a combination of agreement of what was said and sometimes the reading of what was said.

THE COURT: Do I need a transcript?

MR. KAPLAN: There are in the Rock deposition only two or three brief passages. If Mr. Person would identify where he's reading --

MR. PERSON: Page 63, lines 11 through 18:

"Q Are you saying that the division was free to do with the fleet allotment what it wished to do and that was not a corporate policy?

"A What I'm saying is, is that the fleet section had to audit function on the divisions. So at my level the answer to your question would be yes. We never went back and either checked where they went or to what segment. Our yardstick continued to be the F. L. Polk Registration book."

Page 67, the summary, Rock was unaware of any policy one way or the other during the period August 1, 1968 through December 10, 1970, and beyond concerning the availability of fleet allotments to dealers for use in selling to resellers. As far as Rock knows, the issue never arose, at least in the Buick

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division,during that period.

THE COURT: I don't understand that.

MR. KAPLAN: What it means, your Honor, is that Rock didn't know one way or the other during that time period whether the company had any policy about whether people could get fleet allotments to sell to people like Nabcor who were going to resell the cars.

THE COURT: The company being GM as distinguished from a division?

MR. KAPLAN: The divisions operated ther fleet allotments.

THE COURT: State that again.

MR. KAPLAN: What Rock was saying was that he was unaware of any policy anywhere in General Motors during the period August 1, 1968 through December 10, 1970 and continuing for some period beyond that on the question of whether fleet allotments were available to dealers for use in selling to customers who would in turn resell the cars as opposed to fleet allotments available to dealers for use in selling to people like leasing company.

THE COURT: Is this a fair summary?

MR. PERSPN: That's part of it. That's a

pgr3

fair summary to the extent and then we have had some additional material.

THE COURT: Let me get a note, please.

(Pause)

MR. PERSON: As far as Rock knows the issue never arose, at least in the Buick division, during that period.

At page 68 we have a summary:

Allotments are only important when the industry is selling at a rate when GM is near its capacity to manufacture. There are many times when that is not true, and allotments then become very academic. When there is more capacity than orders, the dealers may have more vehicles available than they can sell. When this occurs, GM cuts production schedules.

69: During Mr. Rock's tenure, August 1, 1968 through December 31, 1973, it was not the policy of the GM fleet and government sales section to advise dealers not to do business on a fleet basis "with non-qualified fleet purchasers."

That's a double negative, your Honor. But they're saying during Mr. Rock's tenure at the fleet section it was not the policy to advise dealers not to do business on a fleet basis with non-qualified fleet purchasers.

THE COURT: In other words, was not the policy of the fleet section of General Motors to advise dealers against doing business with whom?

MR. PERSON: In effect resellers, but non-qualified fleet purchasers.

THE COURT: That's the phrase I wanted.

MR. PERSON: This, your Honor, is a summary of his testimony.

THE COURT: I understand that.

MR. PERSON: Page 70, lines 19 through page 71, line 3:

"Q During the same period, August 1, '68 through December 31, '73, did any of the divisional fleet sections have the authority to withhold delivery of automobiles designated by a franchised dealer as a fleet order upon finding out that the order was not in fact a fleet order?

"A Not to my knowledge. . But again, I do not get involved in the implementation of divisional policies.

"Q Do you mean by that answer that you do not believe that they had such authority?

"A Right. And that they did not, as far as any

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relationships or hearing or day to day business that I was involved in."

Page 72, a summary:

The R. L. Polk registrations are used as a guide in determining the total fleet allotments in the Buick Motor Division.

Pages 72-73, a summary:

In Buick, fleet allotments were not set aside for use of particular customers, but fleet orders were filled out of the allotment on a first come, first served basis.

Page 74, a summary:

There is no priority in production given to Buick orders coming out of the fleet allotment versus orders coming out of regular allotments.

Page 102:

Rock has no reports or analyses which analyze the type of person who enters into lease agreements with qualified leasing companies.

Page 102, a summary:

The fleet and government sales section has not tried to analyze the market for leases. In the R. L. Polk registration statistics, data are grouped by rental and leasing companies, so the fleet and government pyr6

sales section does not have the statistical ability to split out leasing from rental.

Pages 102-3, a summary:

Because of the inability to split out rental from leasing registrations, the fleet section can only guess at what portion of the rental and leasing registrations is used for rental and what portion is used for lease. One of the purposes of the fleet certificate is to provide some information about fleet users and to serve as an identification tool.

Page 104, a summary:

Not every qualified company holds a fleet certificate and not every qualified company wants to hold a GM fleet certificate. The fleet certificate is the foundation of a great marketing tool. At this point GM does not have the ability to break down the total rental and leasing registrations into vehicles used for rental and vehicles used for leasing, respectively. Nor does it have the fleet certificate literally computerized.

Pages 104-5, a summary:

The fleet and government sales section has no statistics, studies or other analyses of fleet users other than the information obtained through

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the fleet certificates.

105, a summary:

Mr. Rock and others have concluded that the growth of leasing would not affect retail sales by GM dealers to any appreciable extent, based mostly upon gut reaction due to the lack of statistics one way or the other.

106 and 107, a summary:

"Leasing is plus business" refers to the argument that a dealer who commences a program of leasing cars is not going to be leasing cars to persons who otherwise would be his retail customers. Rock has no specific studies which would support or refute the idea that leasing is plus business for the dealer. The only documentation about the market place are the R. L. Polk registrations.

108, a summary:

Rock has not drawn any conclusions from the Polk registrations as to whether a lease affects the retail sales potential of the dealer. Rock is of the opinion that leasing is a distinct market and that it does not adversely affect the existing retail market. His opinion is based on the premise that leasing is a commercial concept that is used primarily by small and large businesses and professional people. He believes that if a dealer begins to participate in leasing, he has the potential of doing more business than if he limits his operations to sales.

Page 113, a summary:

Rock would not think of anyone other than franchised dealers, qualified leasing companies, qualified users, and holders of fleet certificates as fleet purchasers for any purpose.

Page 110, a summary:

Dealers pay GM the same purchase price irrespective of whether the car is designated retail, stock or fleet on the order form.

And 111, summary:

The prices paid by fleet purchasers vary from dealer to dealer. It's a negotiating business, and Rock believes no two transactions are exactly the same.

This is a complete reading.

MR. KAPLAN: I have four more lines to read. Page 98, line 8, the following:

"Q Was it a policy of General Motors to prevent franchised dealers from selling cars under fleet programs for delivery outside of the dealer's area of responsibility?

"A No, sir."

MR. PERSON: The next one, your Honor, is the Berg deposition.

THE COURT: What is his first name or initials?

MR. PERSON: Robert L. Berg.

Robert L. Berg was director of fleet sales for the Chevrolet division from July 1969 to at least October 8, 1974. He was also director of fleet and government sales section from August 1968 through July 1969 and he was manager of rental leasing and commercial sales in the fleet section from 1965 through 1968.

Page 14 from the summary:

From 1965 through 1968, a company which had 20 or more cars registered in its name would qualify for a fleet certificate, even if the company was also engaged in the business of reselling other cars.

Next is page 20, lines 1 through 11:

"Q Do you have any investigative files that are opened for companies before any application is made for any fleet certificate?

"A What do you mean by investigative files?

"Q Do you have any files which are kept on companies in anticipation of possible application for fleet certificate?

"A In advance of any application being made?

"Q Right.

"A We buy statistical data from R. L. Polk. And we separate that by certificate and non-certificate user. They go into the book, either one, when they register 20 or more. So in that sense, yes, we would have data prior to an application being made."

Next is a summary page 22:

Fleet section as well as divisional fleet personnel solicit applications for a fleet certificate from prospective applicants. Mr. Berg knows of no instance in which the fleet section has solicited a reseller of automobiles to apply for a fleet certificate.

Next is page 22, lines 22 through 23, line 14. Starting at the top of 23 I asked him if he wanted to clarify a prior answer.

MR. KAPLAN: That related to the term "solicit."

MR. PERSON: He goes on:

"Mr. Kleinbard: I don't think so. Would you?

"Mr. Kaplan: Yes, I think so. Why don't you clarify what you meant by solicit, Mr. Berg?

"A Well, solicit, I mean when they're making a contact, if hte subject comes up they would process an application.

"Q What would the purpose of the contact be initially?

"A We maintain contact with fleet users, both certificate and non-certificate. If a regional director would run across a large account in his region that didn't have a certificate, he might want to stop in and visit with him.

"Q Would this be only fleet accounts which qualify for a fleet certificate?

"A Yes."

Page 24, line 7 through 25, line 10:

"Q Did you discuss with Mr. DiSimone any problems or alleged problems between Nabcor and any dealers in the Buffalo Zone?

"A I had some discussions with him concerning the attachment.

"By Mr. Kleinbard:

"Q By the attachment, you mean the bulletin --

"A Dealer bulletin, that's correct.

"Q -- dealer bulletin, dated September 29, 1975?"

Which is a reference to that Buffalo Dealers Automobile Association bulletin.

"By Mr. Person:

"Q Do you recall what you said to him and what he said to you concerning the bulletin number 659, dated September 29, 1967?

"A I have a general recollection of the discussion, but specifics, I don't think I have any recollection now.

"Q Did you discuss with him whether or not Nabcor could be qualified to receive a fleet certificate?

"A Not that I recall.

"Q What discussion did you have with him?

"A I thought I answered that.

"Mr. Kleinbard: I don't know whether Mr. Person has finished his question yet. Have you?

"Q How did the bulletin relate to business of the fleet section?

"A I don't think I understand your question.

"Q How did the information in this bulletin relate to responsibilities on the fleet section?

"Mr. Kleinbard: If it did.

"Q If at all.

"A We participated in the fleet market through our dealers, who were interested in all the information that's available.

"Q Were you interested in matters that were not fleet matters?

"Mr. Kaplan: Whatever that is.

"A I don't know what that means."

MR. KAPLAN: We will read a couple of lines here. Pabe 25, line 21:

"Q Did you take any action with respect to this bulletin, dated September 29, 1967?

"A Not to my knowledge.

"Q Did you have any discussions about this bulletin with anyone other than Mr. DiSimone?

"A Well, I probably discussed it with Al Olson, but I don't specifically recall.

"Q Were you aware of any possibility that the Buffalo zone had transmitted a copy of this bulletin to one or more GM-franchised dealers in the Buffalo zone?

"A No."

MR. PERSON: 32, lines 3 to 16:

"Q Do you know if Nabcor was ever turned down for a fleet certificate by the fleet section?

"A Yes, they were turned down.

"Q And can you recall the circumstances pursuant to which you --

"Mr. Kleinbard: Well, can you explain what you mean by turned down? I shouldhave objected to the form of the question. As I understand it, Nabcor, you either get a fleet certificate or you don't get a fleet certificate. The fact that you don't get a fleet certificate may not necessarily be a turn down.

"A The file would indicate that they didn't qualify.

"Q And can you state why Nabcor did not qualify for a fleet certificate?

"A They hadn't registered 20 or more vehicles which is a requirement. That was set out in the document."

32, lines 2 to 11:

"Q Was there any requirement that a company obtain a fleet certificate to be able to participate in any fleet plans of General Motors?

"A No.

"Q Were any people who participated in any fleet plans of General Motors not qualified to receive a fleet certificate?

"A Yes.

"Q And can you explain in what way a company would not be qualified for a fleet certificate but still be qualified under a fleet plan?

"A All right. The requirements of the certificate is 20 or more. The fleet plans were 10 or more."

MR. KAPLAN: Your Honor, we'll stipulate that the refernec to fleet plans is the reference to the fleet allowance and related plans we told you about at the beginning of the trial.

MR. PERSON: There was no question about the fleet allotment being presented to him at that time. The reference is to rebates rather than fleet allotment.

THE COURT: I understand.

MR. PERSON: 32 is a summary:

Fleet reserves are the same as fleet allocations. Mr. Berg as director of fleet sales in the Chevrolet Motor Division was partially responsible for the establishment of fleet reserves, together with other persons, in and after July 1969.

33, a summary:

From July, 1969 through December, 1970, the procedure in the Chevrolet Division for establishing fleet allocations was to look at production schedules and the historical markets, which would be made available on a fleet basis. The large fleet purchasers would tell Chevrolet Division prior to the model year of their anticipated needs. Chevrolet would solicit indications of their anticipated needs prior to commencement of production of the model, through fleet representatives who made contact with the fleet user.

34, lines 27 through 35, line 24:

"Mr. Kaplan: If in the 1970 model year someone such as Hertz told you in advance of the model run that they were going to buy 124 cars, were they limited to obtaining 124 cars out of the fleet reserve or were they not?

"Mr. Kleinbard: Is that what you wanted to ask, Mr. Person?

"Mr. Person: In substance, yes.

"A No, they wouldn't be.

"Q Would any person buying on a fleet basis --

"Mr. Kleinbard: Oh, well --

"Q Well, I -- without characterizing what type of company that would be, but would any company being able to obtain cars out of the fleet reserve, be limited in the number they could order by virtue of having failed to indicate to the Chevrolet division the total amount of their actual purchases?

"A No."

36, line 9, through 39, line 1:

"Q Can you tell me what orders would be taken out of the fleet reserve?

"A Well, I think it's important that you understand many fleet orders are filled by dealers, don't getinvolved with fleet reserves at all. At that time we were making X number of cars available to the zone. The determination was made at the zone level as to who they were going to give those allocations to.

"Q Was there any policy relating to the allocation which the zone was required to follow?

"A No, not that I know of.

"Q Was the zone free to allow the fleet reserve to be allocated to customers of any type?

"A Within limits.

"Q What limits were they?

"A Well, what we tried to do was to protect large national companies that purchased all across the country, So we would direct a portion of that zone allocation to go to them. But other than that, no there wasn't any policy.

"Q Did you as the director of fleet sales for the Chevrolet Motor Division know of any policy which prevented the zone from making the uncommitted portion of the fleet reserve available to customers of dealers who did not qualify for a fleet certificate?

"A Well, if I understand your question, we intended that fleet reserves be used for fleet and retail be used for retail.

"Q What do you mean by fleet in the context of this answer? What did you mean by fleet when you used the term fleet?

"A I think what you're driving at is whether a fleet purchaser who was a customer of the dealer had to have a fleet certificate in order to be a fleet purchaser.

"Q Was there any policy of the fleet section of the Chevrolet Motor Division relating to the availability of the uncommitted portion of the fleet reserve for orders submitted by purchasers who were not qualified for a fleet plan or a fleet certificate?

"Mr. Kleinbard: Can you eliminate the compound feature of it?

"Q Let's take the fleet plan. If a company could not qualify under a fleet plan --

"A I understand your question. Well, the fleet plan minimum was 10. I know of no case where an order for 10 units would be a problem that would require fleet reserve. Now, if you wanted to get 10 the first month, you wouldn't get them, because the dealer doesn't have them, and we don't have them.

"Q What's the purpose of the allocation?

"A To handle the large customers that the dealer's retail allocation will not handle.

"Q Wouldthis fleet allocation be available to customers of dealers who did not qualify for a fleet certificate even if they ordered 500 cars?

"Mr. Kaplan: Well, that's a little bit hypothetical.

"A It really is.

"Mr. Kaplan: Maybe I can help you out.

"Mr. Person: Well, there's no other basis on which the allocation would be needed. If it was a single car order, even from a fleet customer, there may not be need for the allocation.

"A Right.

"Q But if a company wanted to buy in volume, and if the dealer had the inventory from his normal retail allotment, was there any policy of the Chevrolet division which prevented a dealer from using a fleet allocation to meet any volume orders from customers that did not qualify for a fleet plan?

"A It's hypothetical. I would say it would be virtually impossible for someone not to qualify and then buy 500 cars.

"Q If a company buys 500 cars for resale and has no cars in registration, does that company qualify for a fleet plan or a fleet certificate?

"A No.

"Q If that company submitted an order for 500 cars and is not qualified for a fleet plan or fleet certificate, was it company policy to permit the fleet allocation to be used to fill that order?

"Mr. Kaplan: If there was any policy on that issue.

"Q Yes, was there any company policy that would cover that situation?

"A If we had no registrations, they wouldn't be

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a fleet.

"Q And would the allotment be made available to people who were not qualified to purchase under a fleet plan?

"Mr. Kaplan: Well, not 'would it.' Was there some guideline --

"Q Was there some policy which prevented the use of the fleet allotment for companies that did not qualify under a fleet plan?

"A When you talk about resale, you're talking about individuals, and you're talking about the retail market. We intended our dealers to handle that market."

MR. KAPLAN: I have abour six more lines to read.

I might say before I read them that with the Berg, Rock and Olson depositions, apart fromthe specific discussions,we take the position it's all irrelevant and objectionable but we'll let Mr. Person read.

Page 41, lines 4 to 6:

"Q Do you know of any instance in which any Chevrolet dealer had requested a fleet allotment for Nabcor during the period beginning July, 1969?

"A No."

Page 52, line 23:

"Q Have you communicated with any GM dealers at any time about Nabcor or Frank Maiorana?

"A No, I don't believe so."

Page 53, line 4:

"Q Have you communicated about Nabcor or Mr. Maiorana with any division of General Motors other than the division you were in at the time, other than what you've testified to here today?

"A Not that I know of."

And that takes care of Mr. Berg.

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$97 THE COURT: We will take our recess now, please.

(Jury left the courtroom.)

THE COURT: The question has been raised how to handle a motion to dismiss. Now, what are your plans? Mr. Person is about over.

Can you describe to me in general terms what your plans are and see what we need to do to handle them?

MR. KLEINBARD: Well, I am not sure I follow your Honor. We planned to make an oral presentation.

THE COURT: You are not filing a brief? I don't think any brief is necessary.

MR. KLEINBARD: I don't either, your Honor. I think to the extent the citations are helpful we will include them in the oral presentation.

THE COURT: How long will you need for your oral presentation?

MR. KLEINBARD: We would need several hours dependent frankly to what extent it would become a dialogue as opposed to a unilateral presentation.

THE COURT: It will become a dialogue.

MR. KLEINBARD: I was allowing for that, so it is pretty hard to tell. If it was unilateral,

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we would be taking a couple of hours, but if we have questions obviously it will be longer.

THE COURT: We have in the case against General Motors and maybe against some of the other defendants here various counts in the complaint.

MR .KLEINBARD: That is right.

THE COURT: Are you planning to analyze the counts in the complaint?

MR. KLEINBARD: Yes.

THE COURT: You will present all of this in a motion to dismiss?

MR.KLEINBARD: That is right, your Honor.

THE COURT: There is always a question, and I think it is a very serious question in this case, as to whether just as an initial proposition without getting into the details of the argument, whether it is desirable to think in terms of dismissal at the end of the plaintiffs' case rather than going on and completing the case and letting the case go to the jury. Here we are now in the 28th day and I measure it from the beginning of the preliminary hearing. Of course, we had interruptions with holidays and my motion days and so forth,but 28 days is a lot of work.

Even if we were to grant the motion in whole

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or in part, there would, of course, be an appellate remedy and there is always the possibility that the Court of Appeals would remand for a new trial, which mean that a big bulk of the 28 days would have been wasted, in a manner of speaking.

I really think in order to deal a real job on a motion to dismiss in this case, it would be necessary to take at least a day. I would let the jury go for the day tomorrow.

But I take it from the standpoint of General Motors you feel there is sufficient merit in the motion to take the time and if you win --

MR.KLEINBARD: Both the time and the risk, your Honor. I have considered both.

THE COURT: You feel that it is worth taking both?

MR.KLEINBARD: Yes, your Honor. I just throw out one other feature.

THE COURT: You believe you have grounds to dismiss the entire case at this point?

MR.KLEINBARD: Yes, your Honor, and one of the concerns is that although the case has already taken 28 trial days, I am also considering if the defendants put on their case, we are talking approximately about another

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two weeks and possibly more, depending on how lengthy the cross-examination would be.

I think in the long run I have a strong motion and I am saving the Court's time and my time and Mr. Person's time by making the motion. If I am wrong, that is a risk, of course, that I have to take.

I certainly think it is justified, the day is justified, and whether I persuade your Honor or not is another matter, but when you take one day as opposed to an additional minimum of two weeks or probably more, I think that is a well-spent day in view of the problems that we might have.

That is what I would like to do with your Honor's permission, setting aside a day is probably the wisest thing to do, since it probably would be a day and that is the extent of it.

MR. PERSON: Your Honor, I would argue that this case demands and requires a full record because of the length of the case and the number of issues and the various rulings, that I think the whole case should be able to proceed as far as we can and then to have a judgment with a full record, and then we proceed from that point.

I think we will have enormous delays and costs to the plaintiffs and to myself which aren't warranted, which we can avoid by going in for a full record.

THE COURT: What do you mean by a full record?

MR. PERSON: A full trial record, and see where we are at that point, rather than attempting to cut the case short at this point. It is hard to see that that there aren't triable issues here.

THE COURT: Even if there are some issues -- I went over my entire trial notes over the weekend and there are in and of themselves voluminous. I also went over to some extent the discussion we had on damages that Sunday night, although I think that has been, that discussion has been superseded to some extent by materials that have come in.

I think that it would be useful to take the day to have an argument as to what is or is not shown by the plaintiffs' proof and I think that even if the case goes forward it will help us in clarifying the issues, maybe limiting the issues; maybe if General Motors is successful in dismissing. But I can't believe everything is going to go to the jury.
The claim on Mr. Young is going to go to the jury and

so that the case out of a large number of different types of claims and liability of damages, something has to get clarified, either to be dismissed on the motion to dismiss so that General Motors knows exactly what it is to defend against.

It seems to me one possibility is even if there are things to go forward with, it will relate to particular divisions and particular times, because you know under the broadest view of the case -- I am excluding the claim of delay -- but there isn't any testimony really about any substantial refusals to deal after the Spring of 1967, except up in Buffalo, and that is a special case, and except for Queen City and one or two isolated things which really don't amount to anything.

You have the bulk of Mr. Maiorana's testimony on his original examination and it was very closely tracked when he was recalled on damages, it relates to alleged refusals to deal culminating in the March, April, 1967, period.

Over the weekend I made a list of all the alleged refusals to deal that he had testified to on his original examination when he got on the stand the first few days of this trial, and it is exactly the same thing except for what happened in Buffalo, which is really the Strimple and Bolling testimony. Then except for the very, very isolated instances like Queen City and the Askew matter and so forth.

2 Then you analyze those time things and then you take it by division and you may have a different situation in regard to Cadillac and Chevrolet and Pontiac.

So I think in order to get the case analyzed as it should be, continually, whether it ends tomorrow or three weeks from now, it is necessary to get away, as I think we are doing now, from the generalities and analyze this thing in terms of time, locations, divisions and so forth. I think that the day would be well worth it and I sympathize with Mr. Person in wanting to complete his trial and get to the jury and then he has at least gone the course.

But, on the other hand, the law is that if the case in whole or in part does not deserve to get to the jury, even after the plaintiffs' proof, then you don't force the defendant to go forward on something that simply has not been proved.

So I will expect the plaintiff to rest this afternoon and I will tell the jury that we will be

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engaged in legal argument tomorrow.

We will take a short break.

(Recess.)

(Continued on next page.)

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(Jury in box)

MR. PERSON: Your Honor, this is a reading of the transcript of Albert T. Olson. It's partially summarized and partially I will read the testimony in the transcript.

He was at that time the assistant general sales manager for trucks for General Motors Corporation.

MR. KAPLAN: Chevrolet.

MR. PERSON: Deposition October 7, 1974.

Page 2, summary:

Albert T. Olson, Jr., employed with Chevrolet Division since mid-1969 to at least October 7, 1974 as assistant general sales manager for trucks; and was assistant general sales manager, fleet, for the Chevrolet Division during 1968-9; prior to that, 1966 until mid-spring of 1968, he was director of the fleet section.

THE COURT: The last two captions, what is that?

MR. PERSON: He was assistant sales manger of fleet for Chevrolet, 1968 and 1969, and prior to that, from '66 until mid-spring of 1968 he was director of the fleet section, corporate staff, in Detroit.

THE COURT: Incidentally, before I forget it, could I have the financial statements of Nabcor for the period ending January 31, 1967, and the other figures I have through the offering circular, but if I could have that fiscal '67 financial statement, fine.

MR. KAPLAN: That's Defendants' Exhibit LLL, your Honor. I'll have to get you a complete one.

THE COURT: Please do that.

Proceed, Mr. Person.

MR. PERSON: Page 4, line 13, thorugh 6, line 1:

"Q Can you tell me what the duties of the fleet and government sales section were during your position as director of that section?

"A It was a purely staff function essentially to develop the programs to keep our dealers competitive in the fleet business.

"Q Was there any analysis of the market for persons who leased cars during that period in which you were director?

"A What do you mean, now?

"Q Was there any marketing analysis with respect to the user of cars which were sold for fleet purposes, leasing purposes?

"A I would say the only analysis of a market would have been from registration data provided by R. L. Polk which didn't separate really the rental from the lease.

"Q In what way did you give support services to dealers who were seeking to sell cars to leasing companies?

"A From the corporation staff, we have no direct relationship with dealers other than those who operated their own major leasing companies.

"Q In what way did you provide support services to the divisional fleet sections?

"A Essentially, through attempting to monitor through our field officers the competitive aspects of the business and, I would say, the development of programs which would allow our dealers to be competitive in the fleet business.

"Q Was any part of that to identify the people who leased automobiles?

"A No.

"Q Why not?

"A Just didn't to it.

"Q Did you consider that the user was unimportant in any marketing study?

"A That's an impossible question.

"Q Well, did you consider that the end user of a leased vehicle was irrelevant in analyzing the market for fleet sales?

"A Obviously, no end user was considered irrelevant.

"Q They're not relevant?

"A No, no end user can be construed as being irrelevant to our business success. The end user is the one who possesses the quality of our product, the term of their future.

"Q And did you make any attempt to determine who the end user was of vehicles sold on a fleet basis to leasing companies?

"Mr. Kleinbard: I think he just testified a few minutes ago, on this, no. Correct me if I'm wrong.

"A Correct. That's correct. The only involvement there wouldhave been in the case of a company who had been categorized as a commercial user who left their own ownership into leasing, we would have been knowledgeable about that, but so far as a broad study, no."

Page 5, summary:

Fleet section supported the divisional fleet departmenst by having the regional offices of the fleet section monitor competitive aspects of the business and by developing programs which would allow GM dealers to be competitive in the fleet business. This did not include any significant programs to identify the people who leased automobiles.

This is a summary of what I read so I can proceed to the next one.

7, a summary:

In addition to analyzing the market for fleet sales, the fleet section monitored the activities of GM's competitors so that appropriate programs could be developed to keep GM dealers competitive for fleet sales. Also, the fleet section issued and administered the fleet certificate program. Also, the fleet section provided assistance to the various car divisions, including non-selling contact with prospective fleet purchasers.

8, summary:

The fleet certificate is an identification that the certificate holder is in fact a fleet as determined by those criteria set forth in the certificate itself. If a company requested a fleet certificate, the fleet section would get certain data and issue the fleet certificate if the criteria were met.

Another 8, summary:

It would depend on the company as to whether a company would be interested in obtaining a fleet certificate. The identification that the company as a fleet wouldbe an advantage to the company in and of itself.

Then there is a reference to an Olson Exhibit 1, GM fleet users certificate for 1967, a three-page document. Certificate applicable to all divisions of GM during the period ending 12/31/67. Benefit not itemized in the fleet certificate which may be received by a holder of a certificate are assistance with respect to delays in shipment or service problems by the fleet section.

12, summary:

Fleet reserves were a divisional activity when Olson was with the fleet section. Fleet purchasers, being volume purchasers, tend to buy with prices related to volume at the dealer level. The needs of fleet users exist generally through most of the months of the year. At given periods of time in most years, and in individual models in virtually every year there will tend to be more dealer orders than GM has capacity to build. Under those circumstances, reserves from total anticipated production are set aside so that dealers will be encouraged to provide vehicles in quantities in some reasonable quantity to meet the needs of the individual fleet user.

13, summary:

The fleet reserve decreases the number of vehicles available to GM dealers for sale on a retail basis.

Page 14, lines 14 through 25:

"Q Do you know the maximum amount which in fact was set aside by any division?

"A No.

"Q Were any reports during your period as director of the fleet section made to the fleet section about the amount of reserve, fleet reserve, actually set aside by --

"A I certainly don't know of any, to the best of my knowledge.

"Q How were you able to ascertain the demand for fleet vehicles?

"A Understand, market forecasting or, in short, economic forecasing is a less than precise matter.

Generally speaking, the best data available was the Vehicle Registration Recapitulation provided through the R. L. Polk Company."

MR. KAPLAN: Your Honor, we have a couple of short passages at this point. Page 16, line 5:

"Q Can you tell me whether you have ever discussed Nabcor with anyone outside of General Motors other than counsel at any time?

"A To the best of my knowledge, no."

Page 17:

"Q Well, can you recall any communications that you had relating to Nabcor at any time?

"A You'd like my general recollections of Nabcor?

"Q Yes, right.

"A I don't know how the thing started; at least by that I mean I don't know how it came to my attention. I asked, I have heard, I guess, that they wanted a fleet certificate. I asked my people to determine were they qualified and to the best of my knowledge, I don't recall ever giving them a fleet certificate."

Finally at page 18:

"Q Before the termination of the prior tape,

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I was asking you if you could recall any communications you had during your position as director of fleet relating to Nabcor, and can you tell me what communications you can remember about Nabcor?

"A The initial communication came to my attention and I don't remember the circumstances wherein they were reportedly interested in getting a fleet certificate. I believe I asked the regional fleet section director in New York to contact somebody from Nabcor, and believe he did.

"As a matter of fact, on a succession of occasions, I remember there were some allegations made by Nabcor's representative which, had they been true, would have been in conflict with company policy. I believe there were a succession of contacts reported to me.

"First of all, I would say the first priority would have been in our operation to handle the matter of the alleged violation of our company policy; along with that to investigate the fact to see if in fact the criteria set forth for the fleet certificate holder would have qualified Nabcor.

"Q Could you tell me what allegations Nabcor was making of which you became aware?

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"A I believe there was an allegation having to do with General Motors' personnel having encouraged dealers not to sell to Nabcor.

"Q Are you aware of the extent to which this alleged encouragement of dealers went, as to whether it included sales only on a fleet basis or sales on a fleet and a retail basis?

"A There was no way we could have been aware because every time we inquired of Nabcor they refused to give us instances and names, as a matter of fact, it got to the point where they were making, at least it was reported they were making, rather vague threats, and would supply no information.

"Q Who told you that?

"A I think our man who met with the Nabcor people reported that.

"Q Do you know how many times he inquired of Nabcor to obtain that information?

"A No.

"Q Are you aware of more than one time?

"A I believe that he inquired of that. As a matter of fact, I believe that he inquired of this on a number of occasions. I don't know how many occasions, because my knowledge was per report. The final thing I seem to remember is a letter formalizing a request for such information and behond that to the best of my knowledge, I don't recall any further involvement in the Nabcor case.

"Q Do you know to whom the letter was purportedly sent?

"Mr. Kleinbard: This is the letter requesting information from Nabcor?

"Mr. Person: Right.

"A Which letter do you --

"Q The letter that you have a recollection about, in which --

"A As I recall, I wrote finally specific requests to Mr. Karney along with instructions that he was to formally and in writing request this information from Nabcor."

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MR. PERSON: Page 20, lines 12 through 21:

"Q Is the freedom that the dealer has to sell cars to any person he wishes, on whatever terms, a freedom enjoyed by the dealer only after he makes a purchase, or does it include the freedom to order cars for any person they choose?

"A A dealer's freedom is his own freedom.

"Q Is that a freedom to order cars as well as to sell cars that are already purchased by the dealer?

"A His privilege in ordering is clearly spelled out, as I understand it, in our sales and service agreement and we do not distinguish between one dealer or another in terms of each dealer's proportionate equity."

MR. KAPLAN: I thought you would read the question on the top of page 20:

"Q Was it policy of General Motors Corporation to permit a dealer to sell on any basis whatever to any customer other than the United States Government?

"A Let me say this, so far as my understanding of General Motors Corporation policy is, that the dealers, I am now in the Chevrolet Division, they buy their Chevrolets from us, but those Chevrolets which they do buy from us they are free to sell to whomever rp2 "Olson

they wish under the terms and conditions satisfactory to them. We have absolutely no involvement therein."

MR. PERSON: That came before what I just read.

Page 23, line 3:

"Q Do you recall speaking with Mr. Di Simone, Regional Director, about Nabcor in January of 1968?

"A Some time about then, yes.

"Q I show you a copy of Plaintiffs' Exhibit 339, a letter of January 5, from Mr. Di Simone.

"May I see the exhibit, please? Have you had a chance to read this Exhibit 339?

"A Yes.

"Q Do you recall any discussions with Mr. Di Simone regarding the subject matter of this?

"A In a general sense, I recall this one.

"Q Did you discuss with Mr. Di Simone anything about Nabcor's offer to place an order for approximately 200 passenger cars?

"A No, I called Mr. Di Simone, because somewhere, and I don't know how, I had heard the company's address was Jenkintown, Pennsylvania, which I assumed was reasonably close to Philadelphia, and it was quite natural had there been an inquiry, there might have been an inquiry previously directed to him.

"Q Did you take any action at all with respect to the offer that Nabcor was making to order approximately 200 passenger cars from a Chevrolet dealership?

"A At that point that was at best hearsay.

"Q Do you know how Mr. Di Simone obtained this information?

"A I believe he said it. I don't know how.

"Q Do you know the name of the dealership that was allegedly involved?

"A No. We sought, and I believe documentation would indicate, that over a period of time we sought to find out the names and places. I say 'we', this is personnell of General Motors.

"Q You don't know how this information came to Mr. Di Simone,whether a dealer submitted it or whether Nabcor submitted it?

"A I think I got a letter from him.

"Mr. Kaplan: It says right on the face of the letter, Mr. Person.

"A At that point the information was a total surprise.

"Q It says that Mr. Womack related the following information, but did you speak with Mr. Womack concerning this?

"A No.

"Q Did you request that Mr. Di Simone speak with Mr. Womack concerning this?

"A No. We put this into the normal Chevrolet channels, which we may or may not look in and probably were in already, but I wouldn't want to say.

"Q What would be the normal Chevrolet channel?

"A To contact Chevrolet. There had been an allegation. And here was a statement from another direction, to insure that we ask date, time and places to determine whether or not any, the alleged incident had in fact taken place.

"Q And what did your investigation show?

"A We were unable to pin it down, to the best of my knowledge finally. I guess Mr. Karney, it was, formally, put in a letter to Nabcor. Throughout his discussions with Nabcor, Nabcor had apparently ran around the issue almost like they were trying to set us up.

"Q Did anyone ask Mr. Womack what the name of the Chevrolet dealership was?

"A I don't know.

"Q Can you tell me who conducted the investigation?

"A No.

"Q Can you tell me who asked you to conduct an investigation?

"A I brought it to the attention of the Chevrolet Sales Department.

"Q And where was that department located?

"A In the General Motors Building in Detroit.

"Q Can you tell me how you communicated this matter to t he Chevrolet Department?

"A I am sure there were some letters, and probably phone calls and personal contacts; I don't remember the specifics. You must understand that the allegation was against company policy, wherein once again our dealers only sell to whomever they wish at whatever their terms and conditions are."

Page 26, line 27:

"Q No, does the letter itself to you reflect that Nabcor is complaining because a dealer felt it could not supply 200 cars in absence of a fleet reserve?

"A Understand, Nabcor had indicated certain things in contacts with Mr. Karney, and when he initially contacted them, thenover I guess a succession of contacts by then. This was passed on to me as third and fourth-hand, and then so documented, and accordingly any action taken on this would have been just furtherance of previous discussions to bring it to the attention of Chevrolet. Because once again our policy says that dealers are free to sell to whomever they wish under terms and conditions satisfactory to them, the dealers."

Page 31 is a summary:

"Each car division handled its own policy as to fleet reserves, and it did not come through the Fleet Section."

Page 29, lines 7 through 14:

"Q Is there any policy of General Motors which would have prohibited a Chevrolet dealership during 1967 or 1968 from obtaining 200 automobiles out of a fleet reserve to be delivered to a company engaged in reselling automobiles?

"A This again is policy and we have supplied you with the plans that are applicable for this particular year, that is, the fleet plans that are applicable for this particular year."

Page 32, line 27:

"Q Did you have any conversations with Mr. Womack concerning any of the matters set forth in this letter dated January 5, 1968?

"A The matter was turned over to the Chevrolet

Division.

"Q Do you know if they spoke with Mr. Womack?

"A I don't know.

"Q Did you receive any reports from the Chevrolet Division as to what action, if any, they took about the matters set forth in this letter dated January 5, 1968?

"A I don't know what the action was, if any."

Page 37, lines 9 to 18:

2 "Q Did you ever approve a rejection of Nabcor for a fleet certificate?

"A You don't approve a rejection.

"Q Did you ever reject Nabcor?

"A The last of my recollection there had been no specific turndown. The last recollection I have is borne out by communications, had to do with the request for additional information along with another request for specific information having to do with alleged encouragement not to sell to Nabcor."

Page 38, lines 7 through 12:

"Q Were you the ultimate person in General Motors in charge of approving the issuance of a fleet certificate during your period as director of the Fleet Section?

"A I approved them. However, as in any organization, there is always the right to appeal up to the highest, through the highest level."

Page 39, line 20:

"By Mr. Kleinbard:

"Q I would also like to ask the witness to identify whether this is a document to which he refers, namely, a letter of January 26, 1968, to Mr. Karney?

"A May I speak separately with you?

"Q All right, well, this is the letter that you prepared for Mr. Karney to send?

"A I sent to Mr. Karney.

"Q And then Mr. Karney sent it?

"A Mr. Karney in turn.

"Q The letter of January 26, 1968, is the letter that you sent to Mr. Karney, to which you have previously testified. And then Mr. Karney sent that same letter on the date of January --

"A Not the same letter.

"Q Well, a similar letter, excuse me, on the date of January 31, 1968, to Mr. Frank Maiorana.

"A That's correct, and there was one reply thereto, once again non-specific.

"Q You mean a reply from Mr. Maiorana?

"A That's correct, a non-specific reply.

"Q That's the letter of February 7, 1968?

"A That's correct."

Page 41, lines 2 through 6:

"Q Had you ever decided that Nabcor was not entitled to a fleet certificate?

"A No.

"Q Do you know anyone who made such a determination?

"A No."

Page 53, lines 21 to 54, line 17:

"Q Do you see any basis on which Nabcor could qualify for a fleet certificate with the information provided in that application?

"A On the basis of this information, we ask for further information.

"Q What additional information could you use that would allow Nabcor to fit within the framework of a fleet certificate holder?

"A I believe we set those forth in certain letters whichwe wrote. You are asking me to recall details in the position I had seven years ago.

"Q If Nabcor ownedno vehicles during this period, would they be permitted to obtain a fleet certificate?

"A Your terminology 'permitting to obtain' and things like that --

"Q Would they qualify for a fleet certificate if they owned no vehicles?

"A If they owned no vehicles?

"Q Yes.

"A We have, and again understand I am seven years apart, I believe we issued to lessees a recognition certificate or a recognition card or something, I don't remember the details. So in those cases, they did in fact have some recognition as a fleet user even though they were major lessees, but that's recollection. That's all."

Page 62, line 23, to 63, line 13:

"Q Does General Motors policy prohibit the issuance of a fleet certificate to a company which sells new automobiles and engages in leasing transactions which qualify for a fleet certificate?

"Mr. Kaplan: Assuming, I take it, you mean the company otherwise qualifies?

"Q Right.

"A You are saying now that the company would have one sphere of operation which would be normal fleet, another sphere of operation which would be resale of vehicles?

"Q Right.

"A So far as the normal fleet operation, what would stand on its own.

"By Mr. Kleinbard:

"Q Well, when you say stand on its own, do you stand on that without the certificate?

"A It would be evaluated as a fleet user meeting the established criteria.

"By Mr. Person:

"Q Is there any reason for the fleet certificate, fleet application of Nabcor containing information that Nabcor brokers also sell new vehicles. Is that information necessary in the fleet application, fleet certificate application?

"Mr. Kaplan: This man didn't prepare the certificate.

"Q Why did you slip that information in?

"A Well, I don't know about any of this, other than this was the result of an interview sought by this Maiorana and kept by Mr. Karney. Mr. Maiorana supplied certain information, Mr. Karney wrote it to the best of his knowledge, that's all I know.

"Q But if the operations would be kept separate why is the reference to the other operation contained in the application for the fleet certificate?

"A I would have to guess.

"Mr. Kleinbard: Well, don't guess. If Mr. Karney solicited this information, as I understand it from your testimony, and he's subject to being deposed this week, so why don't we ask him.

"Q Did you ask him to obtain this information about resales of vehicles?

"A I didn't ask him to do anything other than contact Nabcor back in December, at which time he reported to me substantially the facts that appear in this application plus other facts.

"Q And how were these other facts reported to you?

"A I believe there's a letter or a memo to the file from Mr. Karney to me following his first contact with Nabcor. And I thought this would be in December.

"Q In the consideration of this Nabcor application, is it your testimony that the statement 'brokers will also sell new vehicles' should be disregarded by the Fleet Section?

"A We were trying to evaluate the data provided. There is a claim, I assume information provided by Mr.

Maiorana, that there were a thousand vehicles, and apparantly no statistical data to support that one thousand and he, I am sure, deemed necessary some means of explanation as to how the thousand could have had any sort of support.

"Q Would the number of vehicles more than the minimum number make a difference in the consideration of Nabcor's application if Nabcor met the minimum of 20 vehicles. Would you be concerned that Nabcor had more than 20?

"A We're concerned with all the data.

"Q But would the difference between five hundred and a thousand vehicles or twenty and a thousand make a difference?

"A First of all, the difference between twenty and a thousand is 980. 20 is 2 per cent of a thousand.

"Q Does that make a difference in the issuance of the fleet certificate?

"A It would in a sense. It would to me. If you told me you had a thousand of something and facts disclosed twenty, that would to some degree tend to impugn your credibility.

"Q What's the purpose of the fleet certificate, once again?

"A It's set forth here.

"Q Is it try to identify people who buy a minimum number of vehicles?

"A One of the things has to do with."

Page 66 is the summary:

> "The Fleet Section was absolutely not screening applicants for a fleet certificate from a credit standpoint. No credit factors were involved. But Olsonas Director of the Fleet Section does not know why the Fleet Section required a Dun & Bradstreet report on applicants for a fleet certificate. The procedures for evaluation were established before his occupancy of the position, and they continued substantially unchanged. He does not know what the Fleet Section did with the detailed Dun & Bradstreet information when it received it, and does not know why it was required. The Fleet & Government Sales Section did not convey the information to the GM dealer through whom the fleet purchaser was making a fleet order."

Page 69:

"Q Had you ever seen before a copy of this document, the letter from the Greater New York, Long Island & Westchester Automobile Dealers Association?

"A It came in, and I don't know from whom, during or after this, my first involvement with Nabcor, in December; it came in some time during this succession of transactions.

"Q I see, the letter is dated October 21, 1966. Are you saying that the letter did not come in at that time?

"Mr. Kleinbard: If you say it came in some after December of 1967 --

"A It came in some time between mid-December and before early February. I don't know when precisely."

MR. KAPLAN: I have something to read on page 70:

"Q Have you attended any meetings of any dealer associations?

"Mr. Kleinbard: Any or this one in particular. I'll let you ask him whether he's attended this dealer association.

"Q Have you attended any meetings of the Greater New York, Long Island & Westchester Automobile Dealers Association?

"A No, I've --

"Mr. Kleinbard: Let me withdraw that. You may ask him whether he attended the meeting which is reflected here under date of October 21, 1966, whenever that meeting is.

"A The answer to that is no.

"Q Did you attend any meetings of this Automobile Dealers Association?

"A To the best of my knowledge, absolutely not.

"Q Have you attended any meetings of any automobile dealer associations at which Nabcor was discussee?

"A No.

"Q At which any sales by dealers to resellers was discussed?

"A To the best of my knowledge, no."

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MR. PERSON: 79, line 1 to line 7:

MR. KAPLAN: Excuse me. Page 74:

"Q So that you are saying that you were unaware of any problems that Nabcor had relating to dealers who refused to deal solely because Nabcor did not have a fleet certificate?

"A Let me say, I personally was unaware of any problems and had not heard of Nabcor before mid-December, at which time they made these allegations.

"Mr. Kleinbard: Of 1967?

"A That's correct, at which time they made certain allegations, and further than that, requested a fleet certificate."

MR. PERSON: I'm continuing:

"Q Did any of the allegations that were made to you directly or indirectly relating to Nabcor involve any allegation that Nabcor could not obtain cars from franchised dealers because Nabcor did not have a fleet certificate?

"A I really don't remember. I would have to read all of the incoming documents, and if they so state, then in fact I was.

"Mr. Kleinbard: Well, don't speculate because I don't think you're going to find that.

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"Q Then you have no independent recollection whatever other than what is stated in the documents?

"A That's correct."

79, lines 1 to 7:

"Q Did you discuss this Automobile Dealers Association letter with anybody?

"A To the best of my recollection, I forwarded it to, I think to Chevrolet on the basis that it appeared to be negative toward the company and in consideration of our fundamental policy of the dealer selling his goods to whomever he chose under terms and conditions as he saw fit, that we should ensure that there had not, in fact, been any such act as was related."

80, 11 to 13:

"Q What was your concern about this letter?

"A My concern was that it not be construed in any way constrain on the part of the dealers right under our terms and policies."

81, 25 to 86, 27:

"Q Did you take any other action to protect the right of a dealer or to advise dealers of their right to sell to resellers of automobiles?

"A I advised the Chevrolet division who in turn deals with the Chevrolet dealer. As we said

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earlier, at the staff level we have no direct dealer contact.

"Q Did you advise the Chevrolet people that dealers were premitted to sell to any persons they chose to sell to?

"Mr. Kleinbard: Did he tell the people at Chevrolet?

"Q Yes, did you request --

"A I would have to see. The January 11th note to Mr. O'Connor states, 'I believe it is most important the matter be handled quickly, especially as regard to reiterating to Chevrolet field management personnel General Motors policies in such a case as this.'

"By Mr. Kleinbard:

"Q You're referring to what is a GM document?

"A Right. A letter to Mr. O'Connor dated January 11th.

"By Mr. Person:

"Q How did this relate to fleet?"

THE COURT: What year was that?

MR. KAPLAN: 68.

THE COURT: Is that letter in evidence?

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MR. KAPLAN: I'm not sure, your Honor.

MR. PERSON: It's Exhibit 720.

THE COURT: It's not in evidence?

MR. KAPLAN: I'm not sure, your Honor.

It's not in. It's Plaintiffs' Exhibit 335 for identification.

"By Mr. Person:

"Q How did this relate to fleet?

"A It relates to all the business.

"Q In other words, the fleet section handles matters that relate to non-fleet?

"A No."

THE COURT: I'm going to suspend now until 2:15.

(Luncheon recess)

AFTERNOON SESSION
2:35 p.m.

(In open court; jury present)

MR. PERSON: As I had indicated earlier in your chambers I wanted to give you a copy of this. This has been on file. I filed the original. That relates to the request for disqualification in this trial based upon your connection with the law firm of Davis Polk and Wardwell, and there is some additional information, but not anything -- in other words, I had additional information that the same firm had represented General Motors in a very important case to General Motors, the Automatic Transmission case. This was back in 1953. I never had that as any reason for disqualification but I'm pointing that out.

THE COURT: You make your record. I have no objection to your filing this at all. I've looked at it now and I will deny the motion. You have your record.

MR. EPRSON: Thank you, your Honor.

Your Honor, I want to make it clear, as I stated here, that it is not to impugn your integrity whatever. I don't feel right in doing this. It does not feel comfortable. But I'm going --

THE COURT: You have to do your job. When all is said and done, we all have a job to do here. We have done it so far according to our best efforts. There is nothing personal about anything that has happened in this trial, nothing whatever, so you do your job, and file this affidavit, and feel perfectly comfortable about it.

(In open court)

MR. PERSON: Page 86, line 27 through 87, line 5.

MR. KAPLAN: I object to the relevance of this piece.

THE COURT: Give me the transcript.

(At the bench)

(Pause)

THE COURT: It does not go anywhere. What can you argue from that?

MR. PERSON: That it was something of major importance to them. It was extraordinary for it to be referred to the attorneys. It was not an ordinary piece of business.

THE COURT: I'll overrule the objection.

(In open court)

(Mr. Person reading)

"Q Did you refer any matters to the General Motors legal staff or to General Motors outside counsel?

"A Not outside counsel. At some point I spoke to, I think the late Pat Crowley.

"Q Was that during the early part of January, 1968?

"A To the best of my knowledge it was about then."

MR.KAPLAN: I have something.

Page 89, line 5. This is the question, and I'll translate the numbers in accordance with the trial exhibits:

"Q This is Defendants' Exhibit W for identification. The first page is a January 11, 1968 letter to Mr. Frank from Mr. Olson. In this letter it stated: 'Inasmuch as the president of the subject company, Mr. Frank Maiorana, states that there are no company-owned vehicles, I do not see how we could authorize a fleet agreement" --

THE COURT: What are you reading from?

MR. KAPLAN: The deposition, and I'll offer the letter in a moment.

THE COURT: Is there a question ?

MR. KAPLAN: I'm reading it.

THE COURT: I didn't understand.

BY MR. KAPLAN:

"Q This is Defendants' Exhibit W for identification, consisting of various documents. The first page is a January 11, 1968 letter to Mr. Frank from Mr. Olson. In this letter it is stated: 'Inasmuch as the president of the subject company, Mr. Frank Maiorrna, states that there are no company-owned vehicles, I do not see how we could authorize a fleet agreement in this case.'

"Was there any basis on which you felt subsequent to that, that Nabcor could qualify for a fleet certificate?

"Q You leave out the balance of that sentence which refers to the, somewhat similar to the Lilly Tulip Company, the details of which I do not remember at all otner than we had gone I suppose to our in-house counsel for interpretation and I don't know the details of that other than at that time I felt there was a similarity and on the basis of this it would appear they would not qualify. However, to the best of my recollection, we went beyond and asked for further information."

In connection with that I offer Defendants' Exhibit W for identification, which is the document referred to in the text of the deposition.

THE COURT: It will received.

(Defendants' Exhibit W was received in evidence)

xxx

(Mr. Kaplan read to the jury from Defendants' Exhibit W in evidence)

MR. PERSON: Page 94, summary:

A dealer might wish to have a fleet certificate issued for a customer because of the identification aspects, which would perhaps in the dealer's mind make the fleet user more receptive to doing business with the dealer. The certificate is issued in the name of GM, not the dealer, but the dealer might feel that the certificate issuance might encourage the customer to do business with the dealer. The benefits are spelled out in the agreement for the certificate.

102, lines 5 to 14:

"Q Plaintiffs' Exhibit 354 is a General Motors request for certificate from rental and leasing company. Could you take a look at it, please? Let Mr. Kaplan mark it. Can you tell from looking at that document whether a D&B had been received for Nabcor?

"A This says it says hold for. That's all I see. I don't know what this means in the upper left.

"Q Does a poor D&B ever result in a rejection of an application for a fleet certificate?

"A To the best of my knowledge, I really don't know."

106, lines 16 through 25:

"Q Was any report made to you by Mr. Sattler or any other person of Chevrolet division, relating to the allegations that Mr. Womack interfered in some way relating to the allegations that there had been interferences with business in the Buffalo zone.

"A When those allegations were brought to my attention, and anything subsequent that was pertinent; at that time I initially notified Chevrolet; I subsequently sent them additional matters which we have discussed here, I believe. Once having given it to Chevrolet, they made no report back that I ever knew of. That particular part, I have no further knowledge of what actions, if any were taken by Chevrolet."

107, lines 15 through 108, line 5:

"Q Had you received any information from Chevrolet regarding the allegations?

"A No.

"Q You did state that you had requested them to investigate, is that true?

"A To handle the matter.

"Q Do you mean by that, to handle it, including an investigation of the matter?

"A To handle whatever was appropriate because the alleged action involved a matter of distribution which is a divisional function.

"Q Did you ask the Chevrolet division to investigate the allegations relating to the Buffalo zone?

"A Investigate and take appropriate action.

"Q Can you tell me why in this letter you stated that it is not, and I quote: General Motors is not in the position to investigate the circumstances which Mr. Maiorana may have in mind.

"A At that time we didn't know, and we were asking him."

108, line 15 and 109, line 24:

"Q Is it your testimony that to your knowledge no investigation occurred relating to the Buffalo zone incident alleged by Mr. Maiorana?

"A There was an alleged incident which Chevrolet would have gone back and investigated, so far as Chevrolet was concerned.

"Q Did they report back to you about the results of any investigation?

"A No.

"Q Do you know if they had an investigation?

"A I don't know.

"Q Why did you state, and I'll quote once again, that General Motors is not in a position to investigate the circumstances which Mr. Maiorana may have in mind.

"A Mr. Maiorana had filed the complaint with us, He filed verbally. Mr. Karney had on more than one occasion requested times, places and actions, which Mr. Maiorana had seen fit not to give us. Mr. Karney's contacts, and ultimately my contracts with Nabcor w-re through Mr. Karney,and accordingly, we were trying to handle the matter which Mr. Maiorana had alleged, from Maiorana's end.

"Q Do you know what zone Mr. Maiorana's allegations related to? Do you know that it was a Chevrolet matter, for example?

"A Personally, all I know is in the documents which we have covered here one by one today.

"Q Right. You do know it was a Chevrolet matter?

"Mr. Kleinbard: Tha's what the letter of December 15, 1967, states. That's the way it started.

"A That's correct.

"Mr. Kleinbard: Right. We've been all through that.

"Q And you do know that it was the Buffalo zone?

"A That's what the letter so states.

"Q That's also stated in that letter?

"A Right.

"Mr. Kleinbard: Right.

"Q Do you know if any investigation had been made at the zone level in Buffalo relating to Nabcor's allegation?

"A As I told you, I advised Chevrolet sales management it was a distribution matter and at that point it was for their handling.

"Q And you don't know what they did, if anything?

"A I do not know."

Page 117 is a summary:

Olson does not know if the fleet certificate is issued to franchised dealers which don't have leasing subsidiaries. Olson does not recall if GM maintained a list of the holders of fleet certificates when he was director of the fleet and government sales section seven years ago.

119, also a summary:

Olson is unaware of any list of resellers of automobiles (not franchised by GM) who had obtained a fleet certificate from GM.

That's the end of the transcript for Mr. Olson.

(Pause)

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MR. PERSON: 345.

MR. KAPLAN: Same basis as 315.

THE COURT: All right.

xx (Plaintiffs' Exhibit 345 received in evidence.)

MR. PERSON: 349.

MR. KAPLAN: No objection.

THE COURT: Received.

xx (Plaintiffs' Exhibit 349 received in evidence.)

MR.PERSON: 346.

MR. KAPLAN: No objection.

THE COURT: Received.

xx (Plaintiffs' Exhibit 346 received in evidence.)

MR. PERSON: That is the last one.

I will let the jury look at 354, the request for a certificate (handing to jury).

MR. PERSON: I would like a conference on Jamele.

(At the side bar.)

MR. KAPLAN: We have agreed on a summary of the Jamele deposition, which is very lengthy -- not the summary, but the deposition.

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I give you the summary at this point because we object to the whole thing as irrelevant and just has nothing to do with it.

I apologize for my handwriting, but we negotiated during the recess.

(Pause.)

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MR. PERSON: The theory of this is that he was entitled to support services from Nabcor which he did not obtain.

THE COURT: You are not alleging that any of the defendants are connected with his legal troubles?

MR. PERSON: Only in the warranty area is there a connection. He had problems with warranty, but that relates to the legality of the warranty rather than the issues that are now before the jury.

THE COURT: But as far as the difficulties asserted here, you don't content that any of the defendants were responsible for those difficulties?

MR. PERSON: Only to the extent that hurting Nabcor they prevented Mr. Jamele from getting from Nabcor the service he was entitled to.

THE COURT: I will allow it in with that clarification stated to the jury.

(In open court)

MR. PERSON: This is a summary of the transcript of the deceased plaintiff, Louis Jamele, who is represented in this action by his administrator Ralph Ajello.

The claim that is made is not that any of the defendants in the action directly were responsible for any liability thatmay be through Mr. Jamello or his estate; instead the claim is that Mr. Jamele as a Nabcor franchisee was entitled to support services from Nabcor which he did not get, and what I'm doing is reading information that is derived from Mr. Jamele's deposition that relates to this prior to the time he died.

Plaintiff Louis Janele, now deceased is represented in this action by his administrator, Ralph Ajello.

Mr. Jamele's deposition was taken on April 12, 1973. In his deposition Jamele testified that he had experience in new and used car businesses before buying the Nabcor franchise, and was engaged in the used car business when he bought the Nabcor franchise. He bought the Nabcor broker franchise in August 1966 and paid $5000 in cash for it.

The Nabcor franchise was intended to help him in his used car business. He and Nabcor had agreed at the time that Nabcor would pay 50 per cent of any litigation expenses which might arise for Jamele in connection with his Nabcor franchise.

Jamele was concerned that he might not be able to register the cars as new cars in Connecticut even though he had been advised by a Connecticut lawyer that it was possible to register cars in Connecticut with a manufacturer's certificate of origin.

Jamele was active as a Nabcor franchisee in Waterbury, Connecticut for about two years.

Jamele claims that in 1966 the Waterbury office of the Connecticut Motor Vehicle Department initially refused to register the automobiles that Jamele had obtained from Nabcor for Jamele's customers. Hearings were held in Waterbury, Connecticut in 1966 regarding three new car transactions. Subsequently Jamele registered new cars in a motor vehicle bureau office in another Connecticut City without difficulty.

Jamele had a cancellation of a Corvette order in 1966 or 1967. The other cars he ordered from Nabcor he recieved without any problems. In 1967 Jamele applied for a Connecticut automobile brokers license and was refused.

Because of a complaint by the Connecticut Motor Vehicle Bureau a criminal warranty was issued and Jamele was arrested in August of 1968 on a charge of selling new cars without a license. He spent two hours in jail during August, 1968.

In return for the dropping of the charge, Jamele agreed with the motor vehicle department to stop selling new cars. He continued to sell new cars occasionally thereafter.

Jamele sold only five cars per year but claims he would have sold more but for the difficulties with the motor vehicle department. Jamele's legal expenses in connection with his Nabcor franchise operations were a capital drain on Jamele making it impossible for him in his opinion to conduct his business efficiently. The only evidence of legal fees paid by Jamele was $275 paid in 1966.

THE COURT: What was the statement about the one cancellation?

MR. PERSON: '66 or '67 there was a Corvette cancellation.

THE COURT: What was the next statement?

MR. PERSON: That the other cars he received from Nabcor without any problems.

THE COURT: Anythingelse?

MR. PERSON: Yes, your Honor.

We are coming close.

I want to offer into evidence the backup information that was compiled in order to arrive at those two exhibits 714 and 715. These were the sheets that were turned in by 10 o'clock Wednesday morning.

THE COURT: What are we numbering that?

MR. PERSON: 716, subject to whatever corrections are to be made.

MR. KAPLAN: On that basis no problem.

THE COURT: Received.

(Plaintiffs' Exhibit 716 was received in evidence)

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MR. PERSON: I think we marked this previously as Plaintiffs' Exhibit 699, the cancellation documents, that is, the sheets that were compiled relating to cancellations. Is that number correct?

THE COURT: Yes, it is. I have the original exhibit, 699.

MR. PERSON: Fine, your Honor.

It has not been admitted yet, I believe.

THE COURT: We talked about it.

MR. PERSON: Wht I would like to do, it's an offer of proof that I would testify that --

THE COURT: Wait a minute, Mr. Person. Come up.

(At the bench)

MR. PERSON: I have indicated on this yellow sheet of paper in red the documents which I would not now offer by consecutive order. In other words, the Pitcairn Oldsmobile, since it's out of our time frame, I am withdrawing. That's Deal 120 and 135. I withdraw that.

THE COURT: I better mark this. What are you withdrawing?

MR. PERSON: Pitcairn Oldsmobile 120 and 135.

THE COURT: I don't see any 120 nor 135 unless these are out of order.

(Pause)

THE COURT: If these are here we can check that over. If there are sheets about those, could you make a note? Anyway, you are withdrawing those claims?

MR. PERSON: Yes.

Maybe they were pulled out of the earlier time when we had come across that problem.

Kutner Buick, 339.

THE COURT: I have a 339 and I'll mark it withdrawn.

MR. PERSON: And the Kline Pontiac 778

series. There were four or five transactions on the same sheet beginning with 778.

THECOURT: Right.

MR. PERSON: I'm not withdrawing but I'm not using the proof right now. I'm not using this as a method of proviving the claim. There are documents in evidence already.

THE COURT: Are these included in the delay claims?

MR. PERSON: They would be if it was picked up independently.

THE COURT: Am I supposed to pay attention to these Kline items in this?

MR. PERSON: Not as a part of this offering, but as part of the evidence already in the evidence.

THE COURT: I'll write "Ignore these sheets."

MR. PERSON: All right, yourHonor.

THE COURT: I'm marking these sheets "Ignore these sheets, Kline proof elsewhere."

MR. PERSON: The last five are the Plachter Serubo autos which were ordered after December 10, 1970. They would be 900, 1008, 1034, 1035 and 1036.

THE COURT: Instead of a Nabcor consecutive order number you have a notation "Apparent locate."

MR. PERSON: Frank testified on that Cammaro that it was a demonstrator turned back.

With respect to the remaining transactions, these documents represent my own review of Exhibit 450. Based upon the testimony I have heard.

I indicated which of the transactions are the ones that were --for example, with Bates Pontiac, I have five transactions. I'm offering these as the transactions that relate to the incidents that have been testified to. These are not evidence of the liability but identifies which cars were involved --

THE COURT: Wait a minute. ARe you asking to have these admitted into evidence?

MR. PERSON: Yes, as to identify the vehicles that relate to the incidents that have been testified to with Ruckle Pontiac.

MR. KAPLAN: I think it's a matter of argument. I think it should be marked for identification and the evidence shows whatever it shows. I object to having these sheets come in as evidence of the facts.

THE COURT: I suggest this: They are now

marked for identification. As far as identifying your claims, they are exactly what I asked for, and they can be used by the lawyers here to identify the claims as they are used by me to identify your claims and show what transactions you are complaining about.

If they contain nothing more than summaries of the evidence or things that aer stipulated facts, then they could come in just as the General Motors statistical material has come in and your 714 and 715 have come in.

MR. PERSON: It's not based solely on non-verbal evidence. It's based upon verbal evidence. The testimony identifies the transactions that relate to Ruckle Pontiac. That has been brought in verbally. There is no dispute hardly with Ruckle Pontiac. We know the --

THE COURT: What I would suggest is this: I don't know enough about the sources of these and I don't know enough about these documents to be able to judge as to whether they should, for instance, be presented to thejury as evidence.

The problem really arises, if you are able to say that all the information here was taken from documents, that's reasonably easy to check. If you are saying that these things constitute in part a summary of oral testimony, that's a little bit --

MR. PERSON: It's integrated with that.

THE COURT: I think you better use these the ways they have been used, as statements and summaries of your claims. Leave it at that.

MR. PERSON: Then I would reinstate the Kutner Buick 339 and also Kline. There is no reason why they cannot be reinstated at this time.

THE COURT: What are the numbers?

MR. PERSON: 778, and so forth.

THE COURT: I'll X out my note.

339 also?

MR. PERSON: Yes.

THECOURT: I've marked it "Withdrawn" and I'll X that out.

MR. PERSON: I have a summary of each of these transactions relating to the broker, who was the broker that ordered the car. I would like to be able to mark that in the same way to be used in the same way.

THE COURT: That's fine. Do you have that?

(Pause)

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MR. PERSON: This is 717 and I have deleted the transaction of 339 and 778 series from this and I will reinstate them.

THE COURT: Have you got a list of brokers?

MR. PERSON: It ties in the car order number that was cancelled.

THE COURT: The figures at the righthand side are the Nabcor order numbers?

MR. PERSON: Yes.

THE COURT: And the figures at the lefthand side?

MR.PERSON: Are the code numbers of the brokers.

THE COURT: Is 717 complete except for what?

MR. PERSON: 717 are the cancellations that we identified by the testimony on the various incidents such as Ruckel Pontiac, Mid-Town Chevrolet, Colonial Cadillac and the like.

THE COURT: 717 is taken from 699?

MR. PERSON: Correct.

THE COURT: Except there are two things that have been included in 717.

MR. PERSON: I had deleted Kutner Buick, 339. I can reinstate it quickly enough.

THE COURT: Is that a cancellation?

MR. PERSON: Yes, it was Kutner Buick but I wasn't able --

THE COURT: Let's just put it in.

MR. PERSON: All right.

THE COURT: Can't we just write it in here?

MR. PERSON: Yes, but I have to remember which broker it was.

THE COURT: It is New York Auto Sales. I will write in on 717 for identification where it says New York Auto Brokers, I will write in 339.

MR. PERSON: Fine.

THE COURT: Now, what else do you want to add here?

MR. PERSON: I don't believe Kline Pontiac was on here, so there is nothing else.

THE COURT: All right. 717 for identification is used as a summary of a claim. That is fine.

What else, Mr. Person?

MR. PERSON: I have a check list here. I think the last is six pages of Karney.

MR.KAPLAN: I object to that.

THE COURT: Why don't you bring that up.

(In open court.)

THE COURT: Ladies and gentlemen, I will let you take your recess now.

(Jury left the courtroom.)

MR. PERSON: These are retyped portions of what had been done. I didn't photocopy it, but the page numbers are here. You can probably read it from your own volume just as easily.

THE COURT: This is what you want to read?

MR. KAPLAN: I am not clear on what this is.

MR. PERSON: It is just a retyped version. I didn't want to re-photocopy the transcript.

THE COURT: This is from what?

MR. PERSON: From the preliminary hearing.

MR. KAPLAN: My objection is two-fold. First of all, it is cumulative, this whole first part of it.

But more importantly, since I am not concerned really with that part, the last part, Karney's inability to explain why the fleet certificate was the way it was isn't relevant here because it was stipulated that this certificate and these requirements existed in this form at least as early as 1962, which antedates Nabcor by at least four years, and Karney testified they antedated his tenure in the Fleet Section, and I don't see what that has to do with this case.

THE COURT: What does it have to do?

MR. PERSON: We want to show that the fleet certificate in fact doesn't have any meaning and that the fleet certificate was designed to be able to identify which people could get the extra cars, who were permitted purchasers, and we have evidence relating to this in the record.

I would like to have this evidence to show that even the people of General Motors don't have a very good explanation for the fleet certificate.

THE COURT: Is it an antitrust violation not to have a very good explanation?

MR. PERSON: If we bring to the attention of General Motors about how the certificate is being used and they do nothing to correct it, it would seem you have a situation where that is exactly what happened.

THE COURT: Is it an antitrust violation not to go out and correct misunderstandings? Maybe the misunderstanding is unfortunate, maybe there was confusion as to it. Does the antitrust laws say that General Motors has to go and correct misunderstandings in the minds of its dealers?

MR. PERSON: But we are arguing in fact the certificate was used in order to determine who could be able to buy cars from the dealers and who couldn't on a fleet basis.

THE COURT: All right, I will allow it. Simply because it may tie in with the other evidence about the fleet certificate thing.

MR. PERSON: This is the last thing I have.

THE COURT: All right.

(Recess.)

(Jury present.)

MR.PERSON: I am going to distribute to the jury a copy of Exhibit 692, which is in evidence, the list of Nabcor franchisees with the appropriate franchises limited as per instructions.

THE COURT: Let me see 692.

(Handed to Court.)

THE COURT: How does it jibe with X-5 or X-7?

MR. KAPLAN: I am frankly not sure. It is very close.

THE COURT: There is X-5, which is a defendants' exhibit labeled Chronology of Nabcor Franchise Sales. Have you compared these, Mr. Person?

MR. PERSON: No, but I was told it did come from this list.

THE COURT: What came from the list?

MR.PERSON: The defendants' exhibits were derived from the list, 692, before it came in evidence.

MR.KAPLAN: I am not sure of that, but if there is any discrepancy it is small.

THE COURT: The advantages of X-5 is that it is in chronological order. You use your 692 for whatever purposes you want, but I think it would be useful to see if there are any important differences. So you go ahead.

(Exhibit handed to jury.)

MR. PERSON: I just want to give them a few minutes to look through the document and we will proceed with the rest, which will only take a few minutes.

(Pause.)

MR. PERSON: There are a few pages from the testimony of Nelson M. Karney, who was the Regional Director for New York, for the Fleet Section. It is at the preliminary hearing, 961 through 966.

THE COURT: All right.

MR. PERSON: I have left a little bit out. This is questioning by the Court:

"Q Look, if someone has a fleet certificate issued

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by General Motors and goes to a dealer and says, 'I want to buy 30 Pontiacs.' Now, will that fleet certificate assist him in any way in being able to consummate that transaction, either as a kind of vouching for creditworthiness or in some other way?

"A No, your Honor.

"Q What is the point of a fleet certificate, just something you paste on the wall like a diploma, or what is it ?

"A A fleet certificate is primarily for General Motors use in identifying for the divisions the major purchasers of General Motors products, the volume purchasers, if you will.

"It is a means of identification. It provides a mailing list, if you will, for our divisions to supply literature, product information, new car ordering guides.

"It enables the holders of that certificate to send his service personnel, if any, to our General Motors training centers for instruction and training.

"Q Wait a minute, you said, you mentioned two things. One is to identify major purchasers?

"A That is correct.

"Q So they can be subjected to sales efforts, right?

"A That is correct.

"Q Then you said it enabled the user to send service personnel to get training at General Motors?

"A That's correct.

"Q If that is the reason, why would anybody want to run a D & B on the applicant for the fleet certificate?

"A We only ran D & B at that time on leasing companies and daily rental companies.

"Q But why would you do that?

"A Because they were dealer entities in many instances, General Motors dealer entities, who we wanted to differentiate and would make application under the certificate and we wanted to be sure the vehicle could be identified, and it was a separate concern. On occasions --

"Q Why if this was just a sales effort you wanted somehow to have in your files, something to identify prospective sales targets for big batches of cars, why were you having any qualifications for those people? You wanted to sell cars, didn't you?

"A That's correct. But we also wanted that certificate to have value, perceived value, and to be sure that the company was in fact engaged in the business of either rental or leasing vehicles.

"Q Why did you want to see the latter? What difference would it make to you?

"A Whether they were engaged in business, in selling or not? I think it was --

"Q Let's suppose -- did you care whether somebody was bona fide engaged in the business of using cars like New York Telephone or using cars like Hertz versus reselling? Why did it make any difference to you? They were just potential buyers of cars.

"You keep telling me you wanted to ascertain that they had these requirements, right?

"A That's correct.

"Q I ask you why did it make any difference if they had at least 10 used cars? So what?

"A Just a requirement that had been established, your Honor, for the issuance of a certificate.

"Q For what purpose?

"A Again, not to issue it to anyone who had a single car, five cars; identification for our use in those multiple-vehicle operators so that we could direct our field sales personnel, the divisions, to those users to encourage the purchase of General Motors products.

"Q Were these special efforts that you would make?

"A Yes, your Honor, because this individual represented from 20 to 120,000 potential purchases a year.

"Q Look, in other words, this was special sales effort made?

"A That's correct.

"Q You didn't want to make special efforts if you were dealing with something that didn't deserve these special efforts, right?

"A That's correct.

"Q You wanted to know whether in fact the person was going to be a buyer for volume cars, right?

"A That's correct.

2 "Q But if a person was a potential buyer, a volume buyer of cars, what difference did it make to General Motors whether he was Nabcor who was in fact going to resell them immediately or a Hertz which was going to lease them?

"If they were potential buyers of volume of cars, what difference did it make to General Motors what use they put them to? Why wouldn't you be just as anxious to direct your attention to Nabcor as to Hertz if Nabcor was going to buy a thousand cars a year?

"A And we have in the past directed efforts --

"Q But that isn't the answer. You would not give Nabcor the fleet certificate because you said that Nabcor didn't register the cars in their name. Why did it make any difference or don't you know?

"A I don't know, your Honor. That was one of the requirements that we were asked -- it was a carryover for some time period.

"Q But you are just telling us for reasons not totally known that this was a requirement that you tried to enforce?

"A That is correct."

With that we rest the case, your Honor.

MR. KAPLAN: Just three seconds before Mr. Persons rests, we would like to read one question and answer from this.

THE COURT: He has rested.

MR.KAPLAN: I think I am entitled to read something.

MR. PERSON: I withdraw the rest.

MR. KAPLAN: Not that I don't want him to rest.

Page 931:

"Q Did the fleet allocation have anything to do with the fleet certificate?

"A No."

I also invite the jury's attention to a stipulation at page 415 of the record that the fleet certificate existed at least as early as 1962, which is at least four years before there was a Nabcor.

With that I invite Mr. Person to rest.

MR. PERSON: The plaintiff rests.

THE COURT: Now, on behalf of all plaintiffs?

MR. PERSON: Yes, your Honor.

THE COURT: Now, ladies and gentlemen, I am going to recess now until tomorrow when we will be using the entire day for legal arguments. So you are not required to come in.

I am going to instruct you to either stay at your homes or if you are not home, consider yourself on call and leave word at your home where you can be reached. You will be paid for tomorrow because you are in effect holding yourselves open for this case, so we will leave it on that basis.

You will be expected back in at 10 o'clock on Wednesday morning.

(Jury left the courtroom.)

THE COURT: In getting organized for these motions I am going to repeat my request that these volumes of statistical material be taken, and I am sure that overnight Paul, Weiss can go and get this reorganized.

I think that there is Exhibit A-9, B-9, C-9, D-9 and E-9.

I am saying to you what I said before, that in order to see what these exhibits say, the sheets at the end should be incorporated chronologically and the sheets at the beginning of each volume -- the sheets at the end can be marked in red or in some other way "NL" for not in log.

But I think that those sheets at the end were segregated in order to be meticulous and I don't want to muddy the thing up, but from my standpoint I want to be able to draw inferences that are reasonable and I cannot possibly do that without having these things in strict chronological order.

Also, one of the things which I have been considering for several days now and one of the things I considered in going over my notes over the weekend, was trying to get a picture of what the plaintiffs' case added up to as to at least the times when the bulk of the alleged refusals occurred and there are very, very distinct groupings. I mentioned this.

(Continued on next page.)

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It seems to me that as far as the plaintiffs' claims are concerned, the evidence about refusals to deal, refusals to sell cars, that testimony, that evidence, the claims testimony grouped together, has sources. It has mainly the testimony of Frank Maiorana. He has testified as to what he claims occurred by way of refusals. You can all analyze that.

According to my notes, this is based largely on his direct testimony, although he went into this when he resumed the stand on damages, he testified that the very first dealer was Colonial. He did not complete the testimony. It was agreed to defer it by agreement. Then he mentioned Paragon Oldsmobile, some kind of refusal occurring in December of '66. Then he testified about Ruckle, the alleged cutoff in March of 1967; Luby, the alleged cutoff in March of 1967; Midtown, the alleged refusal to deliver late '66, early '67.

He claims there was some kind of refusal by Penske and Norton in September of '66.

So you've got this group of dealers that are alleged to have denied Nabcor cars in the fall of 1966 through March 1967. That is: Colonial, Paragon, Ruckle, Luby, Midtown, and then, really, I think, somewhat inconsequential evidence, but, in any event, Penske and Norton. Penske and Norton occurred before the limitation period. Probably those are out.

There is another series of transactions which were testified to by Bolling and Strimple. The alleged refusals to commit for 200 to 400 cars. In at least one case the refusal to accept the carryover Multi-Make orders, and those incidents are said to have occurred in the fall of 1967, and then you have the incident where they had the car ready -- was it Paul Batt Buick?

MR. PERSON: Yes, your Honor.

THE COURT: In any event, all of that testimony relates to the fall of '66 and early 1967.

MR. PERSON: '67 and '68.

THE COURT: The fall of '67 and early 1968 -- the very, very early part of 1968.

There is also testimony about cutoffs by Rohrer in late '67.

What I'm getting at, you have this testimony about the allged group of incidents occurreing in the fall of '66 through about March of 1967.

Then you have the Buffalo situation and

possibly a situation with Rohrer occurring in the fall of '67 and very early '68.

After that the incidents testified to by Mr. Maiorana or by any ofthe plaintiffs' witnesses that I can recall are limited to an isolated incident with Queens City Chevrolet out in Cincinnati in early 1969;and then the Askew matter mid-'69; and I guess the Cerota matter of the drop shipment -- when was that, Mr. Person?

MR. PERSON: I think it was '69.

THE COURT: I think it was.

MR. KAPLAN: I think so.

THE COURT: Let's aasume that.

Then you've got the claim about Marty Motors delivering to Nabcor, and this business of putting title into the name of the customer of Nabcor rather than in the name of Nabcor. I forget exactly what time period that spanned.

But what I'm trying to summarize, and it may not be complete, is that there are two blocks of times with respect to the major claims according to the testimony of Frank Maiorana and others.

There are two things that occur to me in scrutinizing those claims for a motion to dismiss, and I'm just mentioning this so that the lawyers will have this organized tomorrow.

One, of course, the actual statistics, the actual facts, about those situations which Mr. Maiorana testified about and which the others testified about.

Beyond that, the matter of putting those incidents in the context of the overall dealings, and that was the subject of my request made earlier for some kind of narrative about all of the automobile transactions.

There are a couple of other things that are related which occur to me: In addition to the statements made in the testimony of Mr. Maiorrna and Bolling and Strimple and so forth, there are the claims that are spelled out in this Exhibit 699 for identification. It seems to me that there has to be some analysis of these claims to see if they add anything or subtract anything to the testimony of Mr. Maiorana, Mr. Bolling, and Mr. Strimple.

Do they involve additional time periods? What do they show? I certainly have not gone through and tried to make an analysis in a meaningful way of these claims in 699. I'm now, of course, speaking of refusals to deal and not delays.

Another subject that I hope will be organized is the question of the sale of franchises. I've looked at this exhibit X5. This is supposed to be a complete list?

MR. KAPLAN: At the time we offered it we compiled it from those franchise agreements which the plaintiffs produced. It does not add up to anything like the numbers Mr. Maiorana has talked about. It's at least 100 short of the 250.

I think also Plaintiffs' Exhibit 692 is about 100 short of Mr. Maiorana's claims. We'll reconcile these tonight. There is no real problem.

THE COURT: I've looked at the income figures both in the offering circular and in that exhibit which is the financial statement for 1967. That is somewhat puzzling.

MR. KAPLAN: LLL, your Honor.

THE COURT: In Exhibit X5 there are 52 franchisees listed as having come on in 1966. There are 40 listed as having come on in 1967. There are only ten in 1968. There are 19 in 1969, and there are 28 in 1970. The financial statement -- Exhibit LLL -- for the fiscal year ending January 31, 1967, has franchise income $1500.

The offering circular has, Defendants' Exhibit F6, franchise income ascending appreciably to higher levels in fiscal 1968, fiscal 1969 and fiscal '70, and then some decline in fiscal '71.

One obvious explanation might be that the financial statements were kept on a cash basis. People signed on at a certain date and maybe didn't pay until a later date, but I don't know that that's the case. I think the testimony has been that people gave notes and then those notes had to be written off.

Well, if neither had to be written off it means that they are originally included in assets and of course in sales. So I don't have any evidence indicating that we were on a cash basis in reflecting franchise sales.

I don't think there is any testimony to that effect unless there is something in the offering circular, a footnote or some other testimony that I have forgotten or have not read. That makes me wonder whether X5 is indeed complete. If the information in the offering circular is correct, the franchise income went up from fiscal '67, a figure of $1500, to fiscal '68 to $126,850.

Those are not audited figures. I'm looking at page 24. It's the statement of income for four years, 1968 through 1971, and it has on the top of it "Unaudited."

I don't think anything in here is audited, is it? Even the balance sheet?

MR. KAPLAN: No, your Honor.

THE COURT: Mr. Person, these lists, X5 and 692, are they incomplete? What should I go by?

MR. PERSON: I believe 692 is more complete. It was an attempt by the company at my reqeust to compile a total list of franchisees from the beginning to the end but not including franchisees of franchisees. That's where a discrepancy in the figure comes in. It was not an attempt to take a look at what the broker might have put on himself because we didn't know.

THE COURT: What about the income? I take it that if these financial figures in the offering circular are correct, it means that this was income received from Nabcor by any sale of franchises for which Nabcor was entitled to income, either a direct sale or where they were entitled to a cut of somebody else's sale, right?

MR. PERSON: These were sales that included notes.

THE COURT: I don't have the mechanics in mind, but in other words, if a master broker sold a brokerage and Nabcor was entitled to a percentage of that, that was indicated as income on Nabcor's books at that time?

MR.PERSON: That's my understanding.

THE COURT: Are you saying that --

MR. PERSON: Not necessarily in '66.

THE COURT: When it grew up, when that summary grew up, of having the masters sell and so forth --

MR. PERSON: The only thing the note says is that bad debts were deducted as they occurred. In a footnote to the January 31 --

THE COURT: I'm trying to explain what it seems to me. For instance, in X5 you have only ten franchises listed as having come on in 1968, which is a quarter of those listed for '67 and a fifth of those listed for '66, whereasthe financial statements indicate that for the year ended January 31, 1969, which would include most of calendar '68, franchise income was at 168,000 in contrast to the previous year, 126,000.

MR. KAPLAN: I would like to point out that while you have been talking about this I have been going through 692 and that by no means explains the problem. Under Plaintiffs' Exhibit 692 there were 51 franchises sold in '66 compared to 62 we have in X5.

The next year 41 sold as against 40.

'68 there are nine as against 10.

In '69 they both show 19. I have not finished counting for 1970.

There is no real great disparity.

MR. PERSON: I think it's a different type of franchise. A master brokerage selling for 50,000 may overcome a substantial number of brokerages sold at 1500.

THE COURT: Look at '68. You have two master brokers sold and the rest are regular brokers. I question whether 692 or X5 can be considered a complete list.

MR. KAPLAN: They both tally 149, your Honor, and I don't know where the counting went but this is all we have been able to get any support from.

THE COURT: You started to explain to me and I think I followed you. I thought you said that 692 and X5 would not contain some of the instances where, say, a master broker sold a regular broker franchise.

MR. PERSON: That's my understanding. Like the fellow in Miami, if he sold any brokerages I'm not sure if we picked that up. There would be other instances like that. I don't know what the volume was. A. Wilson might have been one.

THE COURT: I think this is important. If you are going to contend -- and I think you did contend -- there was a kind of death blow administered in '66 and early '67 -- and maybe I'm exaggerating but the use of the words "death blow" but we did have a discussionof that, and it's on the record -- ifyou are going to make a contention that the failures to obtain cars in '66 and early '67 drastically impaired the ability of the company or whatever you are going to say, it seems to me, that has to be measured against whether the company grew or didn't grow in the areas that we're talking about, that is car sales and franchise sales.

It may be thatyou could contend that although there was growth, the growth wouldhave been greater but for General Motors activity; that is a little different than claiming that activity in '66 and '67 caused Nabcor to retrench and led to its decline. A loss in growth rate is not the same as an absolute decline.

MR. PERSON: There was no money.

THE COURT: Wait a minute. I'm talking about the record. I have got a record in the financial statements which were released to the public of a very dramatic growth between 1966 and 1967 by way of franchise sales from $1500 to 126,000, and then I've got further dramatic growth in fiscal '69.

I want to know what youare contending. Are you contending that there was growth but the growth should have been greater or are you contending that there was a decline?

MR. PERSON: There was not any cash. That's the growth in numbers. There were more franchisees that were put on.

THE COURT: That's what I want to know.

Was there a growth in the rate at which franchisees were put on? That would seem to be indicated by the offering circular, not that there was just a growth in the sense that you had 50 put on in 1966 and an additional three put on in '67. That's adding. That's not of any interest.

The question is: Were there more franchisees put on in '67 than '66? In '68 than '67? In '69 than '68?

MR. PERSON: Fewer in each year's comparison, your Honor.

THE COURT: It depends on what youare looking at.

MR. PERSON: The numbers had declined although they bounced back up by ten in 1969, but the numbers --

THE COURT: Mr. Person, you are missing my question. I went through these documents. I can add, but my question, and this is the whole point of my dialogue here, is to ask you to scrutinize these lists in 692 and X5 against the financial statements, because the financial statements would indicate at least in dollar terms that more dollars were earned on franchise income, dramatically more dollars, in each year, each fiscal year '68, '69, '70, than in the preceding year, whereas in the list of names in X5 there is a decline.

What do I make of that? There may be lots of explanations including the explanation that X5 is simply incomplete.

Do you know?

MR. PERSON: I surmize it's accounting in terms of when the recognition of income occurred.

THE COURT: Is there any evidence as to when the recognition of income occurred?

MR. PERSON: I would have to go back and look at these documents. I don't recall there is any testimony on that.

THE COURT: I don't think there is. I think the testimony that is in the record would indicate that there was an accrual basis, and I think you said that a little while ago. You think of that.

Again, we are talking about franchises, and what happened? We are pretty well documented on cars. I think everybody has done as well as they can, but the franchise situation is murky.

MR. PERSON: I think it's represented by a lack of cash. I think that's really it. The sales were promises and they didn't get converted into cash.

THE COURT: That really is not General Motors' fault if they had to take notes.

MR. PERSON: The problem is that the inference with a company that doesn't have substantial capital can do greater damage than to a company that has a lot of capital. So the sales for notes didn't give Nabcor the amount of cash --

THE COURT: Nobodywas telling them they had to take notes.

MR. PERSON: They didn't ask for any interference.

THE COURT: I don't see the relation.

Another thing: As of January 31, 1971, the notes receivable from franchises was only $40,315. There is nothing in the records showing -- maybe there is -- that a quarter of a million dollars in notes was written off, but when was that?

MR. KAPLAN: The interrogatory answers as opposed to the general testimony don't support that at all.

THE COURT: What do they say?

MR. KAPLAN: They say that the notes receivable in January of '67 and May of '67 were in the $40,000 to $80,000 range. That's supposed to be right beforethey wrote off a quarter of a million dollars in notes.

THE COURT: I don't get that. Say that again.

MR. KAPLAN: The interrogatories stated notes receivable as of January 31, 1967, and as at

May 2, '67 as being as I recall in the range from $40,000 to $80,000.

If I remember Mr. Maiorana's testimony accurately, it was right after that that we wrote off a quarter of a million dollars in notes. My point is that the interrogatory answers are inconsistent with the notes that they were carrying in the first place.

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MR. PERSON: I think the testimony was in connection with the public offering.

THE COURT: There was some testimony that in the Fall of 1970 some accountant, unnamed -- maybe named -- wrote them off.

MR. KAPLAN: I think you have all the financial statements, and I don't think you have ever shown the receivable --

THE COURT: Do you have all the financial statements in?

MR. KAPLAN: I think we have LLL, which was January 31, 1967; MMM as of 1968, and I think in the offering circular. I may be mistaken on that.

THE COURT: But no balance sheets.

MR. KAPLAN: Is that right?

THE COURT: They don't have any balance sheets in the offering circular.

MR. KAPLAN: I will see.

THE COURT: I will let you go. But now --

MR. KAPLAN: I take it that there is no difficulty of Mr.Kleinbard and I dividing this task tomorrow?

THE COURT: Not at all.

I would also say that it would help you

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tonight to have the record, so you can borrow my copy again.

MR. PERSON: Thank you, your Honor.

THE COURT: Because I think you need it more than I do, and I have and my clerk has a lot of notes. They are fairly good for our purposes.

Somebody has to get me that volume 25.

MR.PERSON: We have one for you. It is Mr. Kaplan's copy.

THE COURT: I would also like to give to Mr. Kaplan these Exhibits E that you mentioned earlier, A-9 and so forth.

Please get me a transcript of the 22nd of November.

We will adjourn until 10 tomorrow.

(Adjourned to November 30, 1976, at 10.00 A.M.)

to tomorrow. It depends on what your needs are. Certainly I want to consider that.

Also my office got a telephone call from Mr. Watson in Buffalo, and they are having a bad snow storm, and I guess he was going to come down on behalf of all defendants?

MR. KLEINBARD: That is correct.

THE COURT: He is going to get here as soon as he can, but he simply can't get out, so that we have to deal with that also.

I would like to just take a minute on this and straighten out the transcript situation.

MR. PERSON: I think Volume 24-A is 25.

THE COURT: Let's see about that.

The fault is mine, I misnumbered my copies.

MR. PERSON: 24-A could become 25, and that would settle the problem, your Honor.

THE COURT: That is right, it would. I will just renumber those. The numbering is solely mine. Let me just do that right now.

Can I have a listing of the pleadings?

(Handed to Court.)

THE COURT: All right, let's have the motions.

MR. KLEINBARD: Your Honor, I would like to formally move on behalf of General Motors Corporation, General Motors Acceptance Corporation, Frederic G. Donner and James M. Roche pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a directed verdict dismissing each and every count of the complaint as to each and every plaintiff, to such extent as it has not been dismissed previously, on the ground that they are entitled to judgment as a matter of law.

Your Honor, Mr. Kaplan and I, as I think Mr. Kaplan indicated yesterday, has allocated the arguments between the two of us and we have a brief outline of how we intend to proceed, and if I may give that to your Honor, if it is agreeable, we will go ahead in that fashion.

THE COURT: All right. I don't want to bog you down, but I do think at some point you better be specific as to what you are talking about in terms of counts --

MR. KLEINBARD: It is all laid out.

THE COURT: In terms of counts?

MR. KLEINBARD: In terms of counts and everything.

Insofar as the first portion, your Honor, that would fall in Mr. Kaplan's jurisdiction, so I will ask that he be permitted to go forward.

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MR. KAPLAN: I think the first part will be very brief, your Honor.

THE COURT: Please proceed.

MR. KAPLAN: If I can start slightly out of order, I believe Mr. Person is prepared to concede that on the present record we are entitled to a directed verdict dismissing counts 18 through 20 as against Nabcor, and if we can dispose of that at the outset that will save some time.

MR. PERSON: In that respect I'm reserving whatever rights we had in the record relating to the lack of discovery and matters like that. We will concede that we have an insufficiency of evidence in that respect.

THE COURT: That's perfectly fine. Subject to argument you have about pretrial proceedings you are conceding there is an insufficiency of evidence at the trial to support counts 18 through 20?

MR. PERSON: As described in 1B of the brief. I take it those counts are accurate as described in the outline.

MR. KAPLAN: If your Honor will recall, it's a motion for partial summary judgment addressed to those counts.

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In your Honor's opinion, which is recorded at 378 Supp. 620 and following, the Court held that those counts were dismissed as to all plaintiffs other than Nabcor, and as to Nabcor excepting insofar as Nabcor was asserting that the destination charge was calculated in such a way as to prevent dealers from shipping automobiles from one area to another.

THE COURT: In other words, in the summary judgment I dismissed counts 18 to 20 as to all plaintiffs except Nabcor, and then what else?

MR. KAPLAN: You also dismissed those counts as to Nabcor except insofar as they alleged in various legal theories that the destination charges were calculated or computed by General Motors in such a way as to prevent franchised dealers from transshipping automobiles from noe part of the country to another.

THE COURT: I gather what you are saying and what Mr. Person is saying is that what remains to counts 18 through 20 following the summary judgment is now conceded to have insufficient evidence at the trial?

MR. KAPLAN: That's correct.

THE COURT: I think that's clear.

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MR. KAPLAN: If I may, I'll proceed to count 14 which appears at page 72 of the complaint.

THE COURT: Let's have it on the record then that the motion to dismiss the remaining portions of counts 18 to 20 is granted.

Are counts 18 to 20 directed against anybody but your clients?

MR. KAPLAN: Not in this case. They're also directed against Ford, Chrysler and American Motors.

THE COURT: As far as the trial we are now having, the severed trial --

MR. KAPLAN: General Motors is the only defendant on those counts.

THE COURT: I think that's enough on the record as far as that is concerned.

MR. KAPLAN: If I may, I will go to count 14.

Count 14, as with the Robinson Patman counts survived the motion for summary judgment sometime ago only as to the plaintiffs Nabcor, General Auto Sales, and Nabcor East New York.

The complaint alleges that General Motors added to the wholesale price of automobiles sold to

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dealers an amount from $15 to $25, which was turned over to dealer advertising associations for use in advertising for the dealers.

The claim is made that leasing companies were not required to pay those sums or, alternatively, that if the sums were collected they were rebated by General Motors to the leasing companies, and the claim is made that the refusal by General Motors to rebate those sums to Nabcor while it in fact rebated, according to the complaint, to the leasing companies, constituted a violation of the Robinson Patman Act.

Portions of this count of the complaint have been dismissed previously. I think the prior record is somewhat unclear, although if we took enough time we could sort it out as to what parts of the claim are alive and what parts are not, but for present purposes I would think there is no need to do that. There is no proof on this record whatsoever that any of the allegations of the complaint are in fact true.

I would submit, first of all, that there is a total failure of proof on this count, and I'll ask again that Mr. Person concede that on this record we are entitled to a directed verdict dismissing count 14 in its entirety.

MR. PERSON: On the same grounds as the preceding 18 to 20.

THE COURT: That's perfectly satisfactory.

Same ruling. Count 14 insofar as it remains is dismissed.

MR. KAPLAN: That brings me to count 17, which appears at page 79 in the filing of the complaint. It's a Robinson Patman Act claim.

The complaint alleges that General Motors had, during the relevant period, a fleet program pursuant to which leasing companies and other purchasers received various benefits which are spelled out in paragraph 162 of the complaint. It is there as follows:

First, it is alleged that the leasing companies and other fleet purchasers under these programs paid prices of $25 to $50 over manufacturer's invoice.

Second, it is alleged that they received a rebate from General Motors of one per cent to five per cent of the invoiced price.

Third, it is alleged that they were not charged the advertising contribution which was the subject of count 14.

Fourth, it was alleged that they had available to them financing and/or insurance from the financing subsidiary of General Motors.

Five, it is alleged that they received rebates for allowances from the financing insurance subsidiary attributable to business directed to that subsidiary by the particular leasing company or fleet.

Lastly, it is alleged that they received a warranty program covering purchased automobiles.

The plaintiffs assert -- and again this is Nabcor, Nabcor of East New York and General Auto Sales only -- that they did not receive these benefits and that this was a violation of the Robinson Patman Act.

The Court has taken some prior action on this count. The assertion that Nabcor was disadvantaged vis-a-vis these other fleets by virtue of General Motors allegedly providing these people with a warranty program has been dismissed.

There also has been some limitation -- and Mr. Zangara has my copy -- as to whether the remaining claims or claims under Section 2A or 2D or 2E of the Robinson Patman Act -- I don't have that in front of me but I don't think it's necessary.

I'll take up these claims one at a time.

First of all, I would submit there is no proof in the record that General Motors had any program whatever which set the price which leasing companies or fleet purchasers paid for automobiles.

As a matter of fact, Mr. Rock's testimony -- and, indeed, the plaintiffs conceded on their opening statement at page 23, that General Motors charges the dealers the same price for each and every automobile. So I think there is a failure of proof in the allegations of paragraph 162A.

Consistent with the discussion we had --

THE COURT: Go over that again.

MR. KAPLAN: The complaint alleges, your Honor, that part of the General Motors fleet program was that General Motors permitted these fleets to buy from dealers at $25 to $50 over invoice. There is no evidence whatever in this record that General Motors had anything to do with the prices at which fleets or leasing companies bought cars from dealers. The terms of the General Motors fleet plans were stipulated and they're in evidence, and there is no evidence of that at all.

Mr. Rock's testimony in fact, at page 3415, and plaintiffs conceded at page 23 that General Motors charges the dealers exactly the same price for every car. So there is no evidence of any influence by General Motors on the prices that dealers charge to fleets.

THE COURT: In other words, you are saying that phase one of the Robinson Patman Act claim in count 17 is a straight price discrimination alleging that Nabcor, General, and Nabcor East had at least occasionally to pay more for cars than Hertz and Avis and so forth?

MR. KAPLAN: That's a general allegation that goes all through that. But the first phase --

THE COURT: The first phase would be even as to the basic price before we get into allowances and so forth, the fact that Nabcor might have to pay a regular retail price or some other price more than Hertz or Avis is alleged to be price discrimination. This is a claim of yours, Mr. Person?

MR. PERSON: No, your Honor. I did not consciously make any claim that if Hertz gets a better deal from the dealer for the amount it pays over tissue that that would constitute a discrimination. I didn't mean to allege that.

THE COURT: Let's eliminate that.

Let's go to the next phase.

MR. KAPLAN: I think we can boil this down in light of that statement to the claim that the rebate program, is a Robinson Patman violation, the terms of which we have stipulated.

MR. PERSON: We are complaining about the fleet rebate being a price discrimination. That's in the fleet plans we have in evidence.

MR. KAPLAN: Is that all you are alleging in count 17 at this point?

MR. PERSON: I don't know the status of the various rulings, but I wouldsay that there is an insufficiency of evidence -- first of all paragraph C, that has been handled. We have already treated that problem with a prior motion.

THE COURT: That's already treated in something that was dealt with this morning.

MR. PERSON: Yes.

THE COURT: So paragraph --

MR. PERSON: Sub C, 162 --

THE COURT: That's stricken under the ruling we have already made. That's embraced. That's fine.

MR. KAPLAN: Go ahead, Mr. Person. Do you have anything else to say?

MR. PERSON: I'm not sure of the status of the ruling but --

THE COURT: Gentlemen, I want to get from the file -- what isthe latest version of the complaint? What's it called?

MR. KAPLAN: The complaint.

THE COURT: There is no amended complaint?

MR. PERSON: No, your Honor.

MR. KAPLAN: Would you like the complaint, your Honor?

THE COURT: I have it in my office but I don't have it on the desk.

MR. KAPLAN: Here it is, your Honor.

THE COURT: Thank you very much. That will help a lot.

MR. KAPLAN: We are on page 80, your Honor.

MR. PERSON: Paragraph D on the same grounds, a portion of it would be dismissible on the ground of insufficiency relating to the insurance reserves, but the financing, that is the availability -- the availability of insurance would be dismissible, rather, on an insufficiency based upon the same theories we have had, the lack of evidence.

THE COURT: The same grounds as earlier stated?

MR. PERSON: Relating to my pretrial problems.

THE COURT: All right.

MR. PERSON: The financing, however, is still applicable. We have evidence relating to GMAC's refusal to finance.

THE COURT: So we have the financing claim in . What else is in? The rebate claim?

MR. KAPLAN: Yes.

THE COURT: Subparagraph B of 162.

Is that what we are left to argue about?

MR. PERSON: There is E and F.

MR. KAPLAN: F went out before trial.

THE COURT: I think that's right. Subsequent to my written formal decision on the partial summary judgment motion we had further pretrial proceedings at which the issues were further narrowed. Are you representing, Mr. Kaplan, that subparagraph F has already been ruled out?

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MR. KAPLAN: Yes. When Mr. Zangara gets back with my analysis I will give you the record reference on that, unless you have it here.

That is April 19, 1976, page 57 of the transcript.

THE COURT: Then let's take that.

MR. PERSON: That is insufficiency on E.

THE COURT: On the same basis. Subparagraph E of 162 is stricken and dismissed. That leaves --

MR. KAPLAN: B and part of the financing, D, if I am not mistaken.

MR. PERSON: B and the financing part of D is correct.

THE COURT: That is fine.

MR. KAPLAN: First of all, I submit the financing part of D ought to go out because there is no proof with regard to that in the record, that any fleet program of General Motors entailed the availability of financing to fleet or leasing companies, no proof whatever.

It is true that Nabcor made an application for financing but there is no evidence of any relationship between the GM fleet program and that application

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or anything else.

THE COURT: Let me suggest this, Mr. Person. I am certainly agreeable to letting you have time to reply, but I wonder because we are focussing on these claims, if you are able to respond to them while we are thinking about them, it will help me and we won't have to come back to them.

MR. PERSON: My recollection was that we applied for plans here and we were denied and there is documentation in the record.

THE COURT: What type of financing did you claim was available to the fleet purchaser?

MR. PERSON: We sought a rental line of 25 cars.

THE COURT: That was sought in early 1968, right?

MR. PERSON: Correct, your Honor.

THE COURT: And was denied, of course, and you claim that is the basis for your financing discrimination claim?

MR. PERSON: Yes, your Honor.

THE COURT: You claim that the evidence would support the proposition that leasing companies could get the financing?

MR. PERSON: Correct, your Honor. Or a rental car company, and we were seeking a rental car line.

MR. KAPLAN: I would say that there is no evidence in the record that that is so. The evidence of record is that they made application and it was not acted upon.

THE COURT: That is a little narrow reading of the record, of course, but let's assume, it seems to me the real issue is whether there is any, as a matter of law that the record now supports this under Robinson-Patman.

MR. KAPLAN: Let me do this, because I don't want to get hung up on the facts. There are many defects as to the Robinson-Patman claim as a matter of law.

First of all, the Robinson-Patman Act requires in order to state a claim the plaintiff must show that both he and the person who he claims was allegedly favored, whatever the practice is, was a purchaser and a purchaser from the defendant who was being sued. There is no evidence on this record whatsoever that either Nabcor --

THE COURT: Have you got the statute with you?

MR. KAPLAN: I have it right in front of me.

THE COURT: Let me just see that.

What sections of the Robinson-Patman Act are you claiming under as far as the financing thing? If you want to look at the statute now, you can hand this around (handing to Mr. Person).

2 MR. PERSON: I would rather be able to study this. It is hard for me, and this is a very difficult statute and I am sure I will make a mistake if I don't have time really to sit down and study it because we have purchases and services and certain things. I just can't --

THE COURT: I think we have to come to grips with this.

MR. KAPLAN: Maybe if I could go on a minute, your Honor?

THE COURT: All right.

MR. KAPLAN: Under Section 2(a) of Robinson-Patman, which deals with price discrimination, the plaintiffs have to prove there was a discrimination in price by the defendant, and I am quoting from the statute now, "between different purchasers of commodities of like grade and quality." Let me address myself to the price discrimination claim first, because that is all that the rebate claim could possibly be.

Nabcor's testimony in this trial has been that it purchased automobiles from franchised dealers. There has never been any claim made and I believe there is a concession in the opening that Nabcor never bought from General Motors. The only conceivable exception to that is that it did take two deliveries from Mid-Town Chevrolet which was owned by General Motors.

THE COURT: I don't think we have to worry about that.

MR. KAPLAN: I don't think we need to worry about that. They never bought from General Motors nor is there any evidence that any leasing companies with whom they might arguably have competed bought from General Motors, and therefore the basic requirement under Section 2(a) that there be a discrimination between different purchasers simply isn't met.

I think I can cite a case with a certain amount of trepidation, your Honor, but it is a Second Circuit decision in FLM Collision Parts v. Ford, and it is directly in point on the rebate part of the Robinson-Patman claim.

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I don't have to tell your Honor that there the claim was that people bought parts from Ford dealers which dealers in turn bought from Ford and there was a claim of discrimination premised on the assertion that Ford gave rebate to some of those customers of their dealers and not to others, gave a rebate.

THE COURT: I think really that that is a different case. Let's put FLM aside for a moment, because it seems to me that even under my opinion, which was reversed, I was dealing under my concept with situations where Ford was discriminating between its dealers.

Now, let's just -- and the Court of Appeals disagreed -- but let's just take that and see if we have that here.

MR. KAPLAN: We do. That is exactly this case, at least as far as the record is concerned.

THE COURT: Do we have a discrimination by General Motors between dealers in respect to financing?

MR. KAPLAN: I was addressing myself not to the financing at all yet. I was addressing myself to the rebate claim.

THE COURT: I beg your pardon.

MR. KAPLAN: As far as the rebate is concerned, it is stipulated that the program was as follows:

If a General Motors dealer sold to a qualified fleet user, the dealer was eligible to receive a $50 rebate. It is also conceded that Nabcor was not eligible for this rebate.

At certain times the dealer who was eligible could ask that the money be paid directly to the leasing company, but there is no evidence in the record as to whether and when it was done.

So the rebate went either to the dealer or the leasing company, it doesn't matter. The key element is that neither Nabcor nor the leasing company dealt with General Motors.

THE COURT: One thing the Court of Appeals did not deal with in FLM was the question of whether if there was a discrimination between two dealers who then resold and caused some competitive problem, the Court of Appeals did not deal with the question of whether if there was a discrimination between one like Ford and General Motors, between two of its dealers, whether that would be an actionable discrimination under Section 2(a) in favor of someone who was, let us say, indirectly injured for want of a better phrase.

MR. KAPLAN: If I may, the reason the Court of Appeals didn't reach that question in FLM is because it was clear on the record in FLM that Ford treated all Ford dealers alike.

THE COURT: That is fair enough. They said there was no discrimination.

MR. KAPLAN: That is right.

THE COURT: You say that ruling applies here?

MR. KAPLAN: That is true here. It is precisely true here, because the General Motors fleet plans, and I shouldn't refer to them as that, because Cadillac never had any fleet program, provided all General Motors dealers were eligible for this rebate if it sold to customer X but not otherwise, and it is undisputed on this record that the basic price of the automobile to the dealer was always the same.

That is a precise analog of FLM. Therefore, your Honor, I think that the 2(a) claim relating to the fleet rebate goes out.

There are other grounds as well, and we

need not pause very long on any of them if I can be presumptuous about it.

THE COURT: Just to protect you against a possible Supreme Court action in FLM, I wouldn't want you to be overly optimistic. But isn't there a problem about competition?

MR. KAPLAN: If they are not purchasers there is no problem about anything,and they are not purchasers and all of the grounds I am referring to here are alternative grounds, and I raise them because I spent six months being terribly pessimistic about FLM and the fact that I am highly optimistic, I don't want to get too high.

But it is also true under the Robinson-Patman Act, Section 2(a), before there is any actionable claim the plaintiff must prove that he in fact paid a different price that anyone else, than the allegedly favored purchasers.

There is absolutely no evidence on this record that the prices paid by Nabcor were any different than the prices paidby people who allegedly got the rebate. The testimony in fact is that every transaction is different, they are all noegotiated and no two are the same. That is Mr. Roche's testimony which Mr. Person read in. There is nothing else. There is no proof they paid a different price.

Likewise, there is no proof of any specific leasing companies with whom Nabcor competed who received any advantage by virtue of the fleet programs, the fleet rebate in particular.

Nor was there any showing,as there must be, that there were contemporaneous sales of goods of like grade and quality at different prices, which is also an essential element of a 2(a) claim.

Furthermore, there was no proof that even the jurisdictional requirements under the Robinson-Patman Act were satisfied in this case. The commerce requirements under the Robinson-Patman Act are very peculiar, they are the narrowest of any of the anti-trust laws. Three different tests have to be met, one of which is unique to Robinson-Patman, and that is that you pair the alleged discriminatory transactions and look at Nabcor and look at a purchase made by a leasing company whom they claim got a better deal, and one of those transactions has to cross State lines.

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It was so held in Meyer Paving v. General Dynamics in the Seventh Circuit, 486 Fed. 2d 763.

There is no proof of any transaction like that in this case, not one. There is not proof of a single sale to a leasing company at any price, much less a price different from what Nabcor paid.

Lastly, on the argument that we raised in a motion for partial summary judgment, which I am not going to spend much time on but I am making for the sake of completeness, as we read the Robinson-Patman Act, in order to be a purchaser within the meaning of the statute, putting aside the question of a purchaser from whom, one has to be something different from what Nabcor was. Nabcor was nothing more than a conduit. It got purchase orders, took powers of attorney, bought the car, and we say bought the car, I mean bought it in name only, only as a matter of law sales. They took title and turned it over, and I want to make clear that we don't abandon that argument.

THE COURT: I would think, Mr. Person, that this would be a two-way claim, if anything. I think that the rebate thing you are talking about is an issue under 2(a), wouldn't you?

MR. PERSON: I have been reading this and it certainly falls within that. The amount of proof, I believe, is very limited, your Honor. I have tried to make a certain amount, to put a certain amount of evidence in which we did have available, but it goes back to the same discovery problems we had.

THE COURT: I really think, and it is pretty clear to me regardless of the precise intricacies, that really there has been no concentration on this particular claim at the trial, and I think that just speaking in a very general way, and I could analyze it more, I would think regardless of how FLM ultimately turns out, and FLM is certainly the law of the Circuit right now and presumably will remain, but even regardless of that, the different elements are not made out.

MR. PERSON: I would say that we have the same insufficiency for the same reasons.

THE COURT: I think that is a fair statement. We are dealing with the rebate claim in 17 which is embraced in Paragraph 162, Subparagraph (b) of the complaint. That is dismissed on the same basis as was discussed earlier.

That leaves the financing claim in (d) and that claim is really based on the failure of Nabcor to get financing when it applied in early 1968.

MR. PERSON: Yes, your Honor.

THE COURT: Now, what are we talking about, A, or what?

MR. KAPLAN: That would be if anything, your Honor, a Section 2(e) claim. Section 2(d) deals with promotional allowances and services, whereas 2(a) applies to price.

Everything I said about the 2(a) claim goes in spades for the 2(e) claim relating to financing.

Nabcor was not a purchaser, the same jurisdiction arguments apply, but, in addition, there is a fairly basic proposition.

Paragraph 2(e) applies only to discrimination in promotional services and the availability of a line of credit to buy cars for rental purposes is not as a matter of law a promotional service, so I would ask that that claim be dismissed as well on this ground and all others which we raise as to the 2(a) claim.

THE COURT: All right. What do you say about that, Mr. Person?

MR. PERSON: May I keep this claim and just study this statute in relation to that?

THE COURT: Let's make a list of things that are being held. I think thus far every point that Mr. Kaplan has raised the motion has been granted on consent with the reservation about the pretrial that Mr. Person has dealt with, right?

MR. PERSON: Yes, not only pretrial, but during trial.

THE COURT: It is the discovery.

MR. PERSON: Any subpoenas that were quashed, rulings, et cetera.

THE COURT: So far we have dealt with everything. We are reserving on the financing claim in 162(d). Mr. Person will respond to that at a later point.

MR. KAPLAN: The next and last Robinson-Patman claim is Count 24, which appears at page 96 of the complaint. Count 24 deals exclusively with the claim that fleet allowances or fleet rebates violate Section 2(a) of the Robinson-Patman Act, and I think that is controlled by your Honor's ruling relating to rebates. That claim is the same as the one contained in Count 17, Paragraph 162(b), and I think it should be dismissed.

THE COURT: Yes, I agree, that is dismissed.

MR. KAPLAN: That brings me to the question of warranties.

THE COURT: So Count 24 to the extent not already dismissed has been dismissed.

MR. KAPLAN: That brings me to the question of warranties. We have had a redefintion of plaintiff's claim at trial and I want to go back here to the question of the redefinition which I will deal with.

At page 620 and following of the transcript of the trial your Honor asked the plaintiffs to outline what their claims were about the warranty programs, and they said they had two claims.

The first claim was that General Motors' policy, warranty programs, were per se a violation of the antitrust laws in that it limited the warranty to the original purchaser of the vehicle, proscribed people like Nabcor from delivering the same warranty as was delivered by the regular franchised General Motors dealers. That is said to be a per se claim, and I will deal with that first.

We are dealing here with a Sherman Act claim, because these were originally asserted in Counts 5, 6 and 7 of the complaint.

As far as the plaintiff's claim that General Motors warranty program was a per se violation of Section 1 of the Sherman Act, there is at least --

THE COURT: Let me just interrupt. Counts 5 to 7, how do they stack up?

MR. KAPLAN: Counts 5 to 7 made no allegation, and let me turn to that, on page 55 of the complaint. Basically, they made the claims that first General Motors did not give Nabcor a warranty program in the sense that it did not permit it to do warranty work for its customers, and your Honor dismissed that claim.

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THE COURT: Yes.

MR. KAPLAN: They made the claim that General Motors' warranty program permitted businesses like Hertz and Avis to do their own warranty work and be reimbursed by General Motors but General Motors did not permit Nabcor to do it and your Honor dismissed that.

THE COURT: I'll take it I dismissed it unless somebody corrects me very quickly.

MR. PERSON: I believe that's the case.

THE COURT: All right.

MR. KAPLAN: The only parts of counts 5 through 7 which are just Sherman 1, 2 and 3, that is, the only difference between them that I regarded as being alive as we came to trial, were paragraphs E and F, paragraph 116 of the complaint, page 56, the claim that GM's warranty program permitted Nabcor's customers to be harassed, and the warranty program was designed for that purpose.

I take it plaintiffs' statements at 620 and following of the transcript as being in effect and in the complaint. At 620 they make this assertion that the alleged fact that the GM warranties were limited to the original purchasers of teh cars is a per se violation of the Sherman Act.

I'll start with section 1 because as a matter of law it's absolutely clear that there has to be some concerted action to violate section 1 of the Sherman Act. Somebody has to combine, conspire, or contract with somebody else, and thereis absolutely no evidence on this record that GM combined, conspired, or contracted with anybody to do anything about warranty programs.

Moreover, I believe there is not any proof in the record as to what those warranty programs were, and therefore I don't think the plaintiff should prove the factual predicate, so the section 1 claim is dismissible, that is, the per se claim.

MR. PERSON: On that, your Honor, we had decided, this is what I was working under the assumption that we had agreed to hold that off and to determine as a matter of law the legality of these warranty claims.

THE COURT: I think that's right.

The question is whether this is the juncture to do it. I think unless there is a reason to have briefing we can deal with it now. If there is a reason to have briefing I'll reserve decision on that and have briefing.

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Let's see how much of a problem we have.

MR.PERSON: I don't have the copiesof the warranties with me but I have some of them in my office. I have not gotten all of them.

THE COURT: I understand you were claiming and are claiming to the extent General Motors limited its warranty service to first purchasers of cars so as to exclude from warranty service so-called second purchasers like purchasers from Nabcor, then that's a violation of the Sherman Act?

MR. PERSON: Correct. Here is the reason:

The warranty reads in terms of a car delivered through a franchised dealer. That's the conspiracy. The fact that we have a franchised dealer through whom Nabcor bought the car and through whom the warranty could be given in full to a purchaser directly from --

THE COURT: Isn't this something imposed by GM? They don't come down and negotiate with the dealer and say "What do you want to agree to in terms of a warranty program?"

MR.PERSON: It's an Albrecht combination under the Albrecht case.

THE COURT: GM decrees it. They say, "When we sell you the car we agree to provide certain reimbursement for warranty work and we extend the warranty to the first purchaser." This is what GM announces what it will do. Where is the conspiracy?

MR. PERSON: The first purchaser has made an agreement with GM to be bound by the terms GM establishes.

THE COURT: The conspirator and the combiner is the first purchaser from the dealer?

MR. PERSON: The dealer and GM have conspired as a matter of law for this type of warranty program. The dealer is obliged to give whatever GM gives, and under Albrecht that would make a combination under section 1. The dealer has no choice, but that's not --

THE COURT: I think that is FLM, a little bit where I was affirmed, that cuts against you. Wasn't it a situation where the Court simply held that where a company like Ford simply charges a price and the dealer pays the price demanded that is not a conspiracy? Isn't that what they held?

MR. KAPLAN: That's right.

THE COURT: The situation is about like that here where GM simply says "These are the terms on which we will sell it to you. This is the

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warranty we will grant."

MR. PERSON: What they have done is through that arrangement they have prevented a non-franchised dealer from delivering a full warranty --

THE COURT: The question merely is, is this a section 1 situation? Is there a combination? That's the issue being raised.

MR. PERSON: Correct.

THE COURT: I think I see your argument and I'll consider that, but I do think it's pretty well negated by the Sherman 1 ruling in FLM.

MR. PERSON: Just to clarify, we are concerned that the first retail customer of the automobile buys from Nabcor is denied the full benefits of the warranty enjoyed by the first retail purchaser from a franchised dealer. That's the statement.

THE COURT: The first purchaser being whom?

MR. PERSON: Our consumer. He gets less of a warranty than the consumer who buys directly from the franchised dealer.

THE COURT: I think I understand that to be your contention.

Any other points on Sherman 1?

MR. KAPLAN: There is no proof here at all.

of any of the elements, even passing the point of law. The complaint here, after all, is that General Motors set up this program in an illegal fashion, and even if Mr. Person were by some amount corred on the notion that the dealer and GM agreed that once the program was established the GM dealer would provide warranty service according to its terms, there is no evidence that that program was formulated as part of a conspiracy.

Moreover, as this claim was originally pleaded and as I understood it when Mr. Person restated at the time at the trial, the claimwas not a conspiracy with dealer but a conspiracy with the Ford, Chrysler and American Motors Corporations. That's right in the complaint and there is no proof of that at all.

That takes care of Sherman 1.

As far as Sherman 2 --

THE COURT: Let's pause on Sherman 1.

MR. PERSON: I have realleged 1 through 112 in this count so I have alleged the conspiracy. I realleged all the allegations.

THE COURT: I would be prepared to say right now that there is not the slightest evidence of any conspiracy with Ford or Chrysler or American Motors on any warranty.

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MR. PERSON: We have an insufficiency of evidence for various reasons.

THE COURT: The question before me is precisely the question that you posed: Is there evidence and is there a legal basis for holding that there is a conspiracy between General Motors and its dealers on this? That's the question?

MR. PERSON: Correct.

THE COURT: Let's pause on that.

Let us suppose you could say that the dealers and General Motors agreed together that the warranty work would be given to the first purchaser, whoever that was, if it was a Nabcor or a Mr. Smith, whoever that was. Is there anything in that that violates the Sherman Act?

MR. PERSON: The first purchaser or first retail purchaser?

THE COURT: I am assuming for the purposes of our discussion that at least during certain times involved in this case General Motors extended its warranty only to the literal first purchaser, otherwise we would not have any problem.

MR. PERSON: That's right. I thought your hypothesis was trying to visualize a perfect warranty.

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THE COURT: No, no. I want to deal with your claim.

MR. PERSON: You were correct in your statement then.

THE COURT: Obviously if General Motors did not so restrict its warranty, then we would not have any problem; but I assume from what you are discussing, Mr. Kaplan, that at times General Motors did so restrict.

MR. KAPLAN: I should not permit that to be assumed because we do take the position that there is no proof in this record, this trial record, which is what we are addressing here, on the question of what the warranty in fact was.

THE COURT: Aren't the warranties in evidence?

MR. KAPLAN: No.

MR. PERSON: I had made an offer of that but we said that it's not to go before the jury and that it would be handled away from the jury.

MR. KAPLAN: Your Honor said on the per se claim you thought there was no question for the jury. You thought it was an issue of law. I did not understand there was any reservation of proof. The plaintiff rested very unconditionally yesterday.

I don't think we need to argue about that. Even if you assume the plaintiffs' facts there is nothing here.

THE COURT: I would have to read the record.

Let's suppose, Mr. Kaplan, that proof came in.

MR. KAPLAN: Assume that for purposes of argument.

THE COURT: And let's assume that there could be found a combination or a contract between dealers and General Motors to thus limit the warranty work and the warranty reimbursement. Is that a violation of the Sherman Act?

MR. KAPLAN: I submit not and for two reasons.

First of all, even on that assumption we don't have any involvement by the dealers in the formation of the terms that are complained of, which is the offense complained of. But even passing that, there is a more important point:

There is no per se claim here. There is a claim but there certainly is not any authority. There is no reason to assume that such a restraint, even if it existed, was such a pernicious thing that this court

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should create for the first time a per se violation here.

THE COURT: I have to say that I don't see any grounds for telling General Motors under the Sherman Act that they have to have a warranty at all or that they have to extend it to level two versus level one ofthe chaim of distribution. I don't know anything in the antitrust laws that mandates anything like that.

Certainly, as far as a per se violation -- and I would be prepared to hold that this minute, and I'm so holding -- I don't think it merits further discussion.

What I'm holding is that on the assumption that at times relevant to this action General Motors limited its warranty to the literal first purchaser so that the warranty didnot extend to situations where Nabcor bought from a dealer and Nabcor resold to a consumer, meaning that the consumer in that situation could not get the benefit of the warranty.

My conclusion is that there is nothing in the antitrust laws or in the authorities that I'm aware of which could possibly make it a per se violation to limit the warranty as I have just described.

That leaves the question as to whether there is any grounds, in evidence or in law, for this situation to constitute an unreasonable restraint of trade. That's the only issue, it seems to me, that merits discussion.

MR. KAPLAN: I think on that there is again a total failure of proof. I think that in order to make out a rule of reason case there has to be some kind of showing that there is trade which is in fact restrained by the practice in some substantial degree and that it has a serious anti-competitive impact on some market. There is absolutely no evidence of that here, none at all.

MR. PERSON: We have documents relating to a Rev. Kelly and Meehan, one of the two, having problems in getting repairs because of this.

THE COURT: Does that bring it to an anti-trust violation? What happened? Didn't one of them get the warranty work eventually? Reverend Kelly?

MR. PERSON: I think he paid for it himself.

THE COURT: That's in the record?

MR. PERSON: He paid for a water pump himself.

MR. KAPLAN: I think Rev. Kelly's water pump doesn't make General Motors' warranty in restraint of trade.

THE COURT: I think we can find something about Rev. Kelly.

MR. KLEINBARD: I believe, your Honor, the testimony as to that was preliminarly as to the tax exemption.

THE COURT: There may have been something else. Let me try to get that.

(Pause)

THE COURT: I think that Kelly did not get his warranty work.

MR. KAPLAN: That's right, but in addition there is no proof that the car was within the mileage limits or that the defect complained of was the kind that would have been under the warranty in any event.

THE COURT: Aside from that --

MR. KAPLAN: Aside from that it does not amount to a rule of reason case. This is not the United States against Standard Oil, the Rev. Kelly's water pump.

MR. PERSON: Your Honor, we did not put on testimony that did relate to the warranty on the grounds that I thought the warranty issue was being taken out in its entirety in relation to the --

THE COURT: I think it's really a matter of law.

MR. PERSON: May I say I would like to ask permission to put on the evidence that we have relating to some ofthese claims to show that in fact it did work a hardship on Nabcor and Nabcor's customers.

THE COURT: Mr. Person, I'll assume that if Nabcor sold cars and the customers could not get warranty work that that may have been a problem.

What puzzles me is how the antitrust laws, whether you speak in terms of per se violation or unreasonable restraint of trade, how the antitrust laws can be construed as requiring General Motors to extend its warranty beyond what we have been assuming in our discussion here; I think General Motors does not have to promote Nabcor's business. It seems to me that General Motors has a right to have rules about its warranty.

I don't know that I can articulate it fully at the moment, but it seems to me that the extension of the warranty is something that General Motors can pretty much do or not do, and it can set the boundaries for that warranty work, depending on what it decides its commercial interest is.

If General Motors show you used the warranty work thing purposely for monopolization or conspired in any way with the purpose of restraining competition by virtue of the warranty device, that would be a different thing.

I know I've used dangerous words, "purpose," and "intention," and I know that we are not in an area of complete subjectivity, but I think, still, it has meaning here, and what I'm trying to say is that a normal rule and regulation of a manufacturer about the extent of its warranty, you would have to show something far more than you had about it being an anticompetitive device before you have a Sherman Act violation.

MR. PERSON: They have restrained, an alienation of the dealer of the product that the dealer buys. The dealer is restrained from selling the full thing that he purchased. He buys a car with a warranty and as long as he delivered it to a customer he can deliver that warranty to the ultimate purchaser. If he delivers it to a person like Nabcor then his right to alienate the full warranty to the ultimate retail purchaser --

THE COURT: If that's your argument I don't think it stands up.

MR. PERSON: It prevents Nabcor from being able to compete in the reselling of automobiles. That's the pernicious effect of that program, that warranty program.

THE COURT: I take it if you introduced further proof on this it would consist -- what is your offer of proof?

MR. PERSON: That we have instances where customers from Nabcor, or Nabcor's brokers, were refused warranty work because the terms of the warranty did not require the dealer to perform that work.

THE COURT: I will grant the motion to dismiss any claim in the case under Sherman Act 1 relating to the alleged limitation by General Motors of warranty work to the first purchaser.

I take it that is count 5 as amended at the trial?

MR. KAPLAN: I assume so.

THE COURT: Count 5 is Sherman Act 1.

MR. KAPLAN: Yes.

THE COURT: I don't think we have to pause a lot on Sherman Act 2.

MR. KAPLAN: I make the same motion.

THE COURT: I think I will grant the motion.

I think it's a fortiori.

MR. KAPLAN: Also Sherman 3.

THE COURT: The same for Sherman 3.

So I'm dismissing counts 5 through 7 as amended at the trial.

MR. KAPLAN: There was another branch to the warranty claim as amended at trial, 5 through 7, your Honor, which is the assertion by the plaintiffs that the warranty programs were in some fashion administered in a discriminatory manner to their detriment, and I think there is no proof of that either.

THE COURT: What about that?

MR. PERSON: Where our claim was already covered in terms of the wording of the warranty.

THE COURT: So you have no evidence of the specific type of claim Mr. Kaplan has just mentioned?

MR. PERSON: No substantial evidence.

THE COURT: To the extent, if there is such a claim asserted or has heretofore been asserted, you would agree to dismiss along the same basis?

MR. PERSON: Insufficiency.

THE COURT: That's dismissed.

MR. KAPLAN: For the record, I want to make clear on the motion for a directed verdict on the warranty claims, it is also premised on the alternative grounds there was no proof that the plaintiffs were injured of which they complained, no proof from which any damages could have been awarded by this jury on those claims and that concludes my first part of this presentation.

MR. KLEINBARD: I am going to address myself, your Honor, to the boycott issue, counts 1 through 3. I would like to first, if I may, for the record, state the standard because my discussion will inevitably go into evidence to a greater degree than Mr. Kaplan's.

The standard for a directed verdict is well known in this circuit and I think it was rather recently articulated in Epoch Producing Corp. v. Killiam Shows, Inc., 522 F. 2nd 737, which is a 1975 case and certiorari was denied in 1976.

The Second Circuit there said the evidence, in order to grant such a motion, must be such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of a motion is proper.

On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

I don't think I have to cite other authorities. It's a rather well known proposition.

I would like to address myself first to what I regard as three peripheral defendants, Messrs. Donner and Roche and GMAC.

As to Messrs. Donner and Roche, there has been a complete failure to demonstrate in this record that either of them participated in a conspiracy which was aimed at the plaintiffs. The most the evidence can be said to show is that Donner and Roche became aware of Nabcor and that Roche requested subordinates to make inquiry.

As your Honor has observed in another connection, page 725 and 726 of the transcript, there is nothing illegal about looking into or investigating the appearance of possible competition on the business horizon, and there is no evidence that Donner or Roche, or any one on their behalf, took any action against Nabcor.

I believe the law is well established that a corporate officer is not liable for anything that might have happened thereafter merely by virtue of his office unless he knowingly participates in the illegal conduct.

Just again, for the record, I would cite Phelps Dodge Refining Corp. v. FTC, which is 139 F. 2d 393, 397 (2nd 1943), which is a Second Circuit decision, and Coro Inc. v. FTC, 338 F. 2d 149, 154, the First Circuit decision, cert. denied, 380 U. S. 954 (1965), and a very recent decision in this district, Harlem River Consumers Cooperative v. Associated Grocers, 408 F. Supp. 1251, 1271, which was, as this case, a rather complex alleged conspiracy to violate the antitrust laws, and the same was addressed to corporate officers in that situation.

That's really all I have to say about Messrs. Donner and Roche because of absence of proof.

THE COURT: Mr. Person, what have you got about Donner and Roche? I didn't grant summary judgment. I allowed you to take the depositions.

MR. PERSON: They were aware of Nabcor's

formation and they have passed documents. They are responsible for enforcement of the decree in the California case as top officers of the company, and rather than insuring by some action that Nabcor would not be interfered with in its activities they failed to do anything at all, and our proof essentially is it raises a question of the degree to which they are responsible as officers, particularly in light of the injunction against General Motors and their knowledge of Nabcor, the knowledge that Nabcor was competing --

THE COURT: Is there any evidence that they had knowledge of any wrongdoing against Nabcor?

MR. PERSON: There were papers that were submitted to the president and the chairman of the board, Mr. Maiorana's letter of February 8, I believe, in which he had set forth -- this was in response to the Karney letter.

THE COURT: Did that letter go to Mr. Donner or Mr. Roche?

MR. PERSON: It was addressed to both, your Honor.

THE COURT: Let's get that.

MR. KLEINBARD: I believe the copy was addressed to Mr. Cole and Mr. Roche.

THE COURT: Donner had retired. When did he retire?

MR. KAPLAN: October 31, 1967.

MR. KLEINBARD: There is a note on the copy that went to Mr. Cole that said Mr. Cole had not read this.

(Pause)

MR. KLEINBARD: And Mr. Roche may or may not have seen this letter. All that's indicated is that it was received in his office. But I point out further, your Honor, that if you look at the letter --

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THE COURT: Can I see it?

MR.KLEINBARD: Yes, of course.

THE COURT: I wanted to get my recollection from the depositions. So there is no evidence that Mr. Donner or Mr.Roche had at any time any knowledge of any claim of wrongdoing against Nabcor which would have triggered them as officials to take action.

Now, the mere knowledge of Nabcor as a competitor or potential competitor is certainly not enough to make the slightest bit of a case under the antitrust laws. It is not enough to make them a conspirator or make them conspirators in any sense which could make them liable.

There is no evidence at all that they did anything to participate in any conspiracy or did anything against Nabcor or any of its franchisees or directed anything to be done,and I think the only claim articulated by Mr. Person is that they failed as corporate officials to take action, and so I address to you again, Mr. Person, the question, is there any evidence in the record that they knew of any wrongdoing against Nabcor which should have triggered action by them?

MR. PERSON: There is a letter that is

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indicated received by Mr. Roche, and that was the final letter from Mr. Miaorana voicing his complaint, and this requires a response by him.

THE COURT: That is the only thing you have?

MR. PERSON: This is the last thing we have. What we had before is the knowledge of the existence of Nabcor, that Nabcor is a competitive threat. I think that is the New York Automboile Dealers Bulletin and there were some documents relating to Nabcor that we had. I would have to go back now and get those documents.

THE COURT: It is very important on this motion. What documents -- any my memory of those documents is there was nothing except routine notice to corporate officials about potential competition, and if a corporate official doesn't notice his potential competition he is not doing his job.

MR. PERSON: That is correct. These were investigations of Nabcor and concerning Nabcor and I mean --

THE COURT: They did not in and of themselves indicate to Mr. Roche or Mr. Donner that somebody was out conspiring against Nabcor or doing something

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wrong against Nabcor, did they?

MR. PERSON: No.

THE COURT: All right. The letter is dated February 7, and that is Exhibit 356, and that is after the retirement of Mr. Donner from the chairmanship of the board. So insofar as the letter notes that a copy was sent to the president and chairman of the board of General Motors, it could not include Mr. Donner.

So I am here and now granting the motion for dismissal of the complaint as against Mr. Donner.

Now, I want to deal with Mr. Roche.

MR. KLEINBARD: May I be heard on that, your Honor?

THE COURT: Yes.

MR. KLEINBARD: There is no evidence in the deposition, although this letter was received by Mr. Roche's office, that Mr. Roche read it and even if he did --

THE COURT: Was the letter shown at the deposition?

MR. KLEINBARD: He was not asked about it and I don't think he was shown it either.

THE COURT: Was he?

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MR. PERSON: I don't know. I am not sure, your Honor.

MR. KAPLAN: Certainly it is not part of the evidence at the trial.

THE COURT: I made notes of those documents.

2 MR. KLEINBARD: The documents that he was shown for the most part were memos going back and forth saying, "We found from somebody" ==

THE COURT: His attention was brought to Nabcor's existence.

MR. KLEINBARD: Where its office was and what the nature of its business was. They placed an ad in The Times or the Wall Street Journal and that kind of thing.

THE COURT: I am dismissing as against Mr. Roche. There is no evidence that he actually received the letter, except there is certainly a receipt stamp relating to his office. But my point, to be more precise, is that the letter in and of itself in my view constitutes no evidence of participation in a conspiracy. It is a letter in which Mr. Maiorana refuses to give particulars about his claim or alleged claim in the Buffalo area. What went through Mr. Roche's mind upon seeing this letter, if he saw it, is completely unknown, because he was never asked at his deposition, at least in the parts read into the record.

He was never asked about this letter and, therefore, we have no evidence about whether he indeed read it, whether he concentrated on it, what he thought about it and whether he did anything about it. Whether he did anything or did not do anything, all of that is a complete blank, and I am granting the motion to dismiss the complaint as against Mr. Roche.

Let us go to GMAC.

MR. KLEINBARD: GMAC, the only material which even touches on GMAC is the fact that there was evidence in the record to the effect that Nsbcor applied for financing and, according to Frank Maiorana, did not receive it.

There is nothing that indicates that this is part of any particular conspiracy. I don't want to go deeply into the documents, but as your Honor will no doubt recall, there was, I think, sufficient unanswered material on the face of it.

THE COURT: I think at this point I would like you to get into a detailed discussion about the boycott claims against General Motors, and I want to hold off -- I don't want to rule at this point on GMAC.

MR. KLEINBARD: Can we dispose of Counts 1, 2 and 3, your Honor, because I think there is absolutely nothing in this.

THE COURT: The Sherman 2 and 3?

MR. KLEINBARD: As to any defendant, because we have had none of the basic standards met. I am perfectly happy to take it up later.

THE COURT: What about Sherman [illegible] and 3 as to GMAC?

MR. KLEINBARD: As to everybody.

THE COURT: As to everybody.

MR. PERSON: We are relying on 1 and 3, and 3 there is the incident in Washington, D.C., so I don't think it should be dismissed right at this time.

THE COURT: 3 is carrying the Sherman 1 and 2 into --

MR. PERSON: Just 1.

THE COURT: Into the District of Columbia. How about 2?

MR. PERSON: 2, I don't think we have evidence other than the conspiratorial evidence, so that 2 has the insufficient evidence for the same reasons once again.

THE COURT: Let's see, then, how this is going to stack up. We are cutting across different claims, but I think that Count 2 is solely under sherman 2?

MR. KLEINBARD: That is correct.

THE COURT: On the basis of the present concession, Count 2 is dismissed against all defendants involved in this trial, this severed trial.

MR. KLEINBARD: As to Count 3, I would just like to state that the sole allegations with respect to General Motors or even GM dealers, did not take place in the District of Columbia. Lowe was located in Maryland and Matt Slap is located in Philadelphia.

THE COURT: Let's pass that.

MR. KLEINBARD: I will come to that in my discussion of the incidents.

THE COURT: We will take a short recess.

(Recess.)

MR. KLEINBARD: Your Honor, dealing now with Nabcor and Nabcor only, so that your Honor can follow the argument, I am addressing myself first to the question that there was no substantial evidence that GM organized or participated in a widespread conspiracy to drive plaintiffs out of business or to prevent them from obtaining automobiles, and I shall subsequently deal with alleged local conspiracies with any particular dealers.

Addressing myself first to the big picture, it is our position there is no direct evidence that General Motors as a matter of policy took or even contemplated any improper action directed against Nabcor.

If you turn to the circumstantial evidence, we sjbmit it points to the contrary and that plaintiffs have admitted by their testimony and by documents that Nabcor was always able to obtain cars throughout the relevant time period and that, indeed, as Defendants' Exhibit Z-5 indicates, the plaintiffs or Nabcor alleged the automobile manufacturers actually welcomed Nabcor's presence and the records of Nabcor show that Nabcor obtained the overwhelming majority of the automobiles which its brokers ordered.

THE COURT: Can I have the exhi its back, the tabulations?

MR. KLEINBARD: Yes.

Addressing myself to plaintiffs' admissions first, we have Defendants' Exhibit Z-5, which was the promotional leaflet I just alluded to.

THE COURT: I am going to interrupt you to look at various things.

MR.KLEINBARD: All right, your Honor.

While your Honor is looking, I should perhaps say that my associate, Mr. Mescon, who was in court before, has been the operator of the keyboard here and it may be that your Honor would ask a question which he will be able to answer faster than I.

THE COURT: All right, Mr. Mescon.

MR. KLEINBARD: He testified here earlier at one point. He has come back for more.

THE COURT: I have Z-5.

MR. KLEINBARD: I just mentioned that in passing. It is a promotional leaflet which recites that the Nabcor System is not only welcomed by the majority --

THE COURT: When did this come out?

MR. KLEINBARD: In 1968, your Honor. I would just go quickly through some of those things. I don't think we have to spend a great deal of time on them.

There was also Defendants' Exhibit D-6, which is a manual published by Nabcor in 1969, and given thereafter to master distributors, containing suggested answers which they could give to prospective broker franchisees, and I read into the record from pages 22 through 23 of the manual the question, "Won't the dealers try to stop us?"

The answer is, "Mr. Prospective Broker, I am sure that local dealers won't welcome you as a competitor, but that is the reason and the advantage of joining a national system. Nabcor through its contacts nationally can get you automobiles at all times and the local dealers could never stop you."

Then it goes on to say, "That in our four years of operation Nabcor has experienced no difficulty in supplying its brokers with automobiles nor does it anticipate any difficulty in the future. So there is no reason to worry about that particular point."

3 Mr. Maiorana when asked to explain this passage or, rather, volunteered an explanation, he said as follows:

"We had no problem locating dealers nationally, this is a national system, 42,000 dealers, and once a dealer stops us, we can always get another dealer." That is what I meant by that, your Honor, in this book. We could always get a source of supply if it was stopped at one particular place."

That appears at page 1589 of the transcript.

Then turning to the testimony for a moment, Anthony Maiorana testified that it took approximately one to three days for Nabcor to find a new source of supply. He then testified on cross-examination that Nabcor attempted to establish regular sources of supply for each make of automobile so they could submit their entire volume of orders for each make to one or two dealers.

Then he went through, as I am sure your Honor will recall, that from 1967 through 1970 Nabcor obtained Oldsmobiles on a regular basis from Rosenstock Oldsmobile and Marty Motors, and that he knew of no occasion in which Nabcor ordered an Oldsmobile and didn't get it. That is page 1673-79.

THE COURT: I will tell you what, I regard the admissions of Anthony Maiorana as important. The thing that I would like to do is to compare them with the statistical material. I have been through the testimony of Anthony Maiorana, and in order to see how conclusive that is or otherwise, I would like to somehow match it up with the statistical material, and indeed match it up with the claims of the plaintiffs, because I don't suppose this testimony of Anthony Maiorana is exactly a binding admission, although it is important evidence.

But maybe the best thing to do and not interrupt you, is to just hold that. I assume that the point will come that you are going to present your argument based upon the statistics by car sales, and why don't we hold Anthony Maiorana.

MR. KLEINBARD: I will. All I will just indicate is that Anthony Maiorana's testimony appears at 1671 through 1721.

THE COURT: All right.

MR. KLEINBARD: I don't have to go into it any further.

Going back to Plaintiffs' Exhibit 450, that shows that Nabcor received 553 orders for GM cars up to the close of the damage period. I think that is on S-8, your Honor, which is a summary sheet.

That indicates that Nabcor received 553 orders within the damage period and that includes, your Honor, the 43 Colonial Cadillac orders, and I am using orders in quotation marks there because we do not have written orders, and I think there has been really a failure of proof that these orders were placed with

Colonial Cadillac.

Of the 553 as indicated on the summary some actually antedate the damage period because the summary is for the period July 2, 1966, through December 10, 1970.

Defendants' Exhibit S-8 shows that Nabcor received between 446 and it should now reflect 512 new cars as a maximum.

THE COURT: What is the difference?

MR. KLEINBARD: One car, one Buick, your Honor.

THE COURT: Reduce it to 100 Buicks?

MR. KLEINBARD: That is correct. That is as a result of Saturday's meeting, I understand.

THE COURT: I think you ought to get the original exhibit and correct that.

MR. KLEINBARD: All right. What you have there is the result of the keypuncher which Mr. Person called our attention to, the same car appears at page 30 and page 40 of Exhibit C-9.

THE COURT: All right.

MR. KLEINBARD: It reduces the maximum Buicks from 101 to 100.

THE COURT: There must have been some other change in the Buick column. Where was that?

MR. MESCON: The car in question was a 1967 Buick, your Honor.

THE COURT: But the figure at the end, 100 is the sum of some other figure.

MR. MESCON: The third column from the right should read 19 instead of 20 for Buick.

THE COURT: All right, very good. And the figure at the bottom, the total should be 117?

MR. KLEINBARD: That is correct, your Honor.

THE COURT: That is fine.

MR. KLEINBARD: So that I think it is fair to say that the overwhelming number of cars that were ordered were delivered. In addition to that, Plaintiffs' 699, which purports to be a complete list of all orders for GM cars which the plaintiffs claim was not filled, I believe that is for identification only, if you examine those records they show for the last three and a half years of the relevant four-year damage period, namely, June, 1967, through December of 1970, Nabcor obtained every GM car --

THE COURT: June, 1967, through what?

MR. KLEINBARD: December 10, 1970. Nabcor obtained every GM car which it ordered except one, which is the Askew Corvette about which I will speak later.

I am also, your Honor, going to take up later the so-called special period, that is, late 1966-early 1967, so I would like to defer that for a minute, but I am going to take it up.

THE COURT: You say that if you take Exhibit 699 --

MR.KLEINBARD: That is right, supposedly the list of all orders of GM cars which plaintiffs claim were not filled as a result of this alleged conspiracy.

THE COURT: Are you talking about June 1 or June 30, 1967? I don't know whether it makes any difference, but what are you talking about?

MR. KLEINBARD: I will see if I can particularize it further for your Honor. Just one second.

THE COURT: The tabulation that we have made from Exhibit 699 shows that the cases of cancellation or non-delivery alleged are as follows, and I am just referring to certain dates.

There is a transaction, No. 339, a 1967 Buick ordered from Kutner May 29, 1967, for New York Auto Brokers, and it notes in Mr. Person's exhibit cancelled by customer

July 18, 1967, and there is something indicating that the car was not according to specifications.

But if you could tell me --

MR. KLEINBARD: Could you tell me the page number, your Honor?

THE COURT: Order No. 339. But let me ask you this: what is it you are referring to, what cutoff car from your standpoint?

MR. KLEINBARD: I am saying it is cutoff car 91, page 91 of 699, and the order number -- it is dated June 1. There is no order number, your Honor.

THE COURT: Let us look at 91.

MR. KLEINBARD: It was cancelled on June 22, so what I am saying is that from June 22 of 1967 until the end of the damage period the only car which --

THE COURT: This was the demonstrator?

MR. KLEINBARD: That is right.

THE COURT: How can you claim if A.C. Chevrolet sold them a demonstrator and claimed it was a new car and Nabcor didn't like it, is that anything you can claim is a conspiratorial activity?

MR. PERSON: Your Honor, it is evidence they can't order the cars from the factory.

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THE COURT: I thought the testimony was they

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just considered it fraud on the part of A.C. Chevrolet. They didn't like the demonstrator getting palmed off. Is there any evidence A.C.Chevrolet couldn't order the car from the factory? The fact that they palmed off a demonstrator, is that evidence they can't get the car from the factory?

MR. PERSON: I am not sure, since they are not a defendant, I don't think that the reason would be in the record.

THE COURT: It certainly is not. I think we have to put that aside, that means nothing except somebody was trying to gyp you, apparently, if that testimony is true.

MR. PERSON: They take the order, and if they can't deliver the order --

THE COURT: There is a lot of speculation in that. This is not going to make or break the case, but I don't want to get involved in worrying about whether a palming off of a demonstrator is part of the case.

MR. KLEINBARD: Your Honor, with respect to that particular car, Kutner, we would point out that it was 33 days from the date of the purchase agreement to the date when Nabcor placed the order with Kutner.

MR. MESCON: That is page 53 of the Buick orders, and that order is on that page.

THE COURT: All right.

MR. KLEINBARD: I would also note, your Honor, that apparently it was cancelled because it was not in accordance with the specifications, it was oversized tires.

It is very similar, I think, to the demonstrator car that you were just referring to. I don't know for what purpose your Honor is fixing on this particular order, but it certainly does not indicate refusal to deal.

THE COURT: I want to try to fix what event you had in mind, which was a sort of terminal event when you referred to June, 1970 --

MR. KLEINBARD: June, 1967, it just happens to come out that way. I can't point to any historical event.

THE COURT: Let me just note this.

Whether you are referring to June literally or something about that time, according to our tabulation from 699, after the Kutner transaction or after the A.C. demonstrator transaction, whatever the last one in that series of events, the next thing that we have noted from

699 is Order No. 565, and that relates to a 1969 Buick ordered from Cunningham September 19, 1968, and cancelled by Cunningham and reordered from Bano.

Now, the next thing is Order No. 583 in Exhibit 699, and that is the Askew transaction.

MR. KLEINBARD: Right.

THE COURT: The only point I wanted to bring up, because I don't know what the significance is, there was a series of orders for 1971 Cadillacs, 893, 895, 896, 897, 898, ordered from Saboru, or whatever the name is, beginning in November, 1970, and one of those orders was December 2, 1970.

MR. KLEINBARD: I deal with those, your Honor, on the ground that the refusal or the failure to deliver occurred after the violative crime. I would consider those time barred. That's beginning with 893, 895 -- I don't know if you have them the same way I have them. There are ten cars.

THE COURT: I would like to put aside those late 1970 transactions for the moment. I think we want to --

MR. KLEINBARD: That's my position on it.

THE COURT: I think we'll keep that in mind as to some possible significance.

Go ahead.

MR. KLEINBARD: Moving on, I would then turn to some of what I call a handful of episodes which are perhaps relied on by the plaintiffs which, taken together, in my judgment, do not permit an inference of conspiracy. I'll treat them first generally and take cessations or refusals to deal by dealers without more.

It is my position that there is no inference of conspiracy involving GM. I think we have had a lot of discussion about that as to the wide variety of explanations for why somebody might cease to deal or refuse to deal, such as a bad check order, insufficient volume, unavailability of fleet allowances, disagreement as to price, the availability of cars, and the time ordered during the model year.

Some of the cars referred to in Plaintiffs' Exhibit 714 will show on their face, some 69 cars, that they were ordered very early in the model year and therefore a delay in delivery might be anticipated.

THE COURT: What exhibit are you referring to?

MR. KLEINBARD: I'll come to it later in more detail, but I'm speaking of Plaintiff's Exhibit 714, which is the delay schedule put in by Mr. Person.

THE COURT: In early '67?

MR. KLEINBARD: These are total delays. If you look at that schedule, you can see that a car order was being placed early in '69 -- when I say early I mean October or November of '69 -- but it's not unreasonable to expect there might be a delay in the delivery of that car.

Concededly, the dealers could decide that Nabcor was competition and refuse to sell for that reason. That's been admitted in testimony by both Maioranas, Frank at pages 1462 to 63 and Anthony at

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pages 1768 to 69, and also from Plaintiffs' Exhibit 648 page 9, which I read to the jury -- I think it was my last question to Mr. Maiorana on recross -- and Defendants' Exhibit D6, at pages 22 to 23: That's the training manual that we referred to earlier.

Then another reason would be that Nabcor presented itself, or permitted itself, to be regarded as a leasing company. We have testimony to that effect from Mr. Turco at pages 2856 to 61, from Anthony Maiorana 1769 and 70, and then from dealer representatives, Mr. Urso, 1984 to 85, Mr. Ripperger at 1939 and Mr. Murray at 1877.

THE COURT: What is the significance of that?

MR. KLEINBARD: When they found out that it was something other than a leasing company, if they failed to cease to deal thereafter it does not evidence any conspiracy on the part of GM with that particular dealer.

There also has been some discussion of GM's efforts to make certain that certain fleet allowances were not made. If that effort was in connection with an admittedly unqualified firm, I think your Honor has already indicated that GM had a right to

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see to it that its fleet allowances went to people in accordance with the plan, and we had such testimony in connection with Kline Pontiac.

The plaintiffs offered in evidence and read to the jury three Pontiac interorganizational letters discussing whether Kline Pontiac should or should not receive a $50 basic purchase allowance and whether the cars sold to Nabcor by Kline Pontiac should come out of Kline's retail allotment or fleet allotment. That's Plaintiffs' Exhibits 110 to 112.

They failed to offer any proof that that particular activity was part of any conspiracy directed at Nabcor, and when the documents were read to the jury you issued an instruction to which there was no objection along the lines I have just discussed, namely, that I don't think anybody contests that there is anything illegal about GM's basic purchase sllowance program, and then you went on at some length. I will not repeat it.

It appears at page 651 of the transcript.

MR. PERSON: I don't agree with that instruction, your Honor. I would have to check the record, but I don't agree with your interpretation of that evidence.

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THE COURT: Did you object at the time?

MR. KLEINBARD: No, your Honor.

THE COURT: It's a little late.

Proceed.

MR. KLEINBARD: As we referred toin connection with the testimony of Messrs. Donner and Roche, the plaintiffs offered evidence and read to the jury a number of documents showing that General Motors employees took notice of Nabcor and expressed interest in learning what Nabcor was doing.

We say that, and yourHonor has already stated, such communications of taking notice of the competition, following what the competition was doing, are routine business communications, appropriate business communications, and certainly not evidence of any conspiracy.

Your Honor, we say further, passing to another subject, that Nabcor's version of its alleged contacts with General Motors employees is not substantial evidence of GM's involvement in a conspiracy directed against Nabcor. Here I would like to go through those employees very briefly.

The communications with George Zibold were stricken.

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The communications with Messrs. Belcher, Karney, Fogg, Drury, Speece and DiSimone, which are at various points in the record -- if your Honor wishes me to point them out I will, but if not I will go ahead -- these communications were testified to primarily by Frank Maiorana, and although we dispute his version of these communications we recognize that for purposes of this motion we have to assume that what he says is true, and we say that even if it was true there is nothing involved in any of the communications with these gentlemen which proves that General Motors engaged in a conspiracy against Nabcor.

THE COURT: How do you say that? If you take those things as true --

MR. KLEINBARD: For example, his communications with Mr. Belcher, he came in and made various complaints to Mr. Belcher, and then taking his version of the facts he says that Belcher asked him whether a fleet certificate would help, and then Belcher referred him to somebody, Mr. Karney, whom he thought could help him with respect to a fleet certificate.

Then at a later conversation with Mr. Belcher he indicated that he, Mr. Maiorana indicated, might be willing to start a small leasing company for the purpose

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of getting a fleet certificate provided GM could provide the financing, or GMAC.

THE COURT: Doesn't Mr. Maiorana contend in his testimony, or hasn't he testified, that Belcher in effect admitted that General Motors was engaged in activity to stop Nabcor, not that Belcher himself did it?

I think the contention will be that Belcher admitted conduct by other unknown people. After Mr. Maiorana claims that he told there was a serious problem in Buffalo and General Motors' road men were threatening to cancel the dealers if they sold to Nabcor and mentioned one in particular, Bob English, and he says he gave the Buffalo Association bulletin to Belcher, then Belcher said something to the effect according to Maiorana, "I'm aware of these things happening," there is more later, but that is, to me, the thing you have to worry about in the testimony about Belcher. That's the question as to whether there was an admission, not conduct by Belcher.

MR. KLEINBARD: Let's stop there. We are agreed there is no conduct by Belcher himself.

I suppose the question there goes as to what conceivable basis there is for having Belcher testify as to an awareness of this particular problem, he not being in the operations end of the business.

THE COURT: Maybe I'm wrong about there being any admissions. I don't want to pass that subject without inquiring.

MR. KLEINBARD: Your Honor, I read at the time, shortly after that statement was made, at page 1195 on cross, from his depoisition as follows:

"Then he said to me (Mr. Maiorana) he said, 'Do you realize that we don't know anything about this? This is the corporation and the automobile division is separate.'"

And I sought to use that as impeachment.

Your Honor then said at page 1196:

"I must say, Mr. Kleinbard, I don't see the contradiction."

So what I have here is your Honor's statement that he is aware is the same thing in effect as saying "We realize we don't know anything about that."

I don't want to get into credibility questions, your Honor --

THE COURT: For the sake of this motion, if we are talking about the testimony at the Belcher meeting, I know there are arguments that Mr. Person will make about the fleet certificate business, the failure to do this and that by Belcher, but the thing I want to concentrate on at the moment is the question as to whether Belcher made any admissions that General Motors was engaged in wrongful activity or himself made any of these statements about Nabcor being a bootlegger and so forth.

In looking over my notes right now I must tell you that I don't really find that.

MR. KLEINBARD: I'm clear he did nto say Nabcor was a bootlegger or anything of that sort. The furthest you can take the Maiorana testimony is to the point where your Honor took it, namely that he allegedly said he was aware that these things happen. I don't know that that's the same thing as an admission that the particular things that Mr. Maiorana came to talk --

THE COURT: What is the transcriopt on that?

MR. KLEINBARD: The aware of?

THE COURT: Yes.

MR. KLEINBARD: 435.

THE COURT: Yes, he says, according to Mr. Maiorana, he looked over the Buffalo Association bulletij and said "Look, Mr. Maiorana, I am aware that these things happen. You know there are a lot of overzealous young fellows that we take in, young fellows fresh out of college; they are indoctrinated with the GM system and the policy and you know what GM does is right, and they go into these dealerships as roadmen and sometimes they see things which they feel should not be done and they can become threatening."

So I guess, according to my notes now and the reading of this, I would not say that that is an admission of specific --

MR. KLEINBARD: In order for it to be an admission it would have to be something explicit rather than general awareness. That's leaving aside all the questions of credibility and his own contradiction on the subject and so forth.

I think it is clear that Mr. Belcher actually, himself, made no theats and, indeed, did nothing more than refer Mr. Maiorana to someone that would be helpful in connection with a fleet certificate and to another person that would be helpful in connection with financing.

The other people I have mentioned have either said nothing or done nothing along the lines that would be evidentiary of conspiracy.

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THE COURT: Let's take Karney. Did he make any admissions of wrongdoing or did he make any threats or characterizations of Nabcor as a bootlegger, that kind of thing? I don't have any notes that he did.

MR. KLEINGARD: I don't recall that he did. I don't think there is anything with respect to Mr. Karney.

THE COURT: And then there was Mr. Fogg who was present.

The only thing we should note is that they asked questions about who the sources of supply were. I think the plaintiffs would contend that that had some implication. But as far as any direct admission of wrongdoing or threats --

MR. KLEINBARD: I don't think Mr. Speece or Mr. DiSimone said anything of that nature to Mr. Frank Maiorana. I'll deal with Mr. Anthony Maiorana in a little while.

So on this group of witnesses, insofar as Mr. Frank Maiorana's testimony is concerned, I would say that we have no admissions or evidence of conspiracy.

THE COURT: But Speece and DiSimone made, according to Anthony Maiorana, some statements.

MR. KLEINBARD: I can deal with that now if you want me to.

THE COURT: I guess Frank did not see them, right?

MR. KLEINBARD: That's right. They were telephone conversations only. You may remember Mr. DiSimone invited him to come meet with him but he did not.

THE COURT: No conversations of substance with Frank, is that right?

MR. KLEINBARD: That's right.

While we are on the subject I can touch on Anthony.

Anthony testified that he met with Speece and DiSimone in December of 1967 and that they asked where he was getting Chevrolets from and that he told them he was getting Chevrolets from Rohrer. At the end of the meeting,according to Mr. Maiorana, one of these gentlemen said "The dealers would not sell us (referring to Nabcor) any automobiles to resell and that they would see to it that we would not get cars to resell."

That's at 1642 of the transcript.

Our position there is that even if such a statement was made it would not show that General

Motors was involved in a conspiracy against Nabcor because Mr. Maiorana claimed that he mentioned one source, namely Rohrer Chevrolet, and Nabcor's records would show --

THE COURT: What is the page?

MR. KLEINBARD: 1642. That's the place where they say, one of them said, that dealers would not sell. I don't have the precise page where Rohrer is mentioned.

But the significant thing is that following this so-called statement, and even admitting for purposes of this motion that it took place, Nabcor's own records show that Rohrer Chevrolet sold 83 new Chevrolets to Nabcor and it's impossible to regard this as terrible probative or substantial evidence that a conspiracy exists.

THE COURT: This would have taken place when?

MR. KLEINBARD: Are you referring to the meeting or the sales?

THE COURT: The meeting.

MR. KLEINBARD: That was on the 12th or 13th of December, 1967.

The evidence of the sales by Rohrer

Chevrolet appears in our Exhibit D7 and also at page 1735 of the transcript.

(Pause)

THE COURT: What is the evidence about Rohrer?

MR. KLEINBARD: There are two or three situations I want to give you. The citation as to the source, that is to say Anthony's reference to Rohrer as the source of his Chevrolets, appears at page 1641 of the transcript.

THE COURT: But the continued sales by Rohrer?

MR. KLEINBARD: That would be in Defendants' Exhibit D7 and it's a record of cars purchased by Nabcor from Rohrer Chevrolet.

THE COURT: How many after December?

MR. KLEINBARD: 83, I believe, your Honor.

THE COURT: Speece was who?

MR. KLEINBARD: Both of them -- one was from the regional office, that's DiSimone, the regional fleet office, and I think Speece was from the zone office.

THE COURT: Of Chevrolet?

MR. KLEINBARD: Yes.

While we are on that subject --

THE COURT: So Speece was with the --

MR. KLEINBARD: Speece accompanied --

THECOURT: We have to be careful on who they were but we don't have to worry too much about that; I don't want to get involved, and I'm sure you are not getting involved, in preliminary hearing evidence. We have to stick to this record.

Is it in this record who Speece was or is that just --

MR. KLEINBARD: Let me double check.

At page 459 Mr. Maiorana said:

"Mr. Speece's function was that he was zone manager of Chevrolet, Philadelphia zone."

THE COURT: Fine.

MR. KLEINBARD: Let me see if he said anything about DiSimone.

THE COURT: I think that was covered in depositions, that DiSimone played one or another function in the fleet section of General Motors.

MR. KLEINBARD: Correct, your Honor.

My attention has been called, your Honor, I'm sorry to backtrack, to Frank Maiorana, contacts with Speece and DiSimone. There is the following, and I mention it to you out of a double sense of caution:

Mr. Maiorana said at page 461 that Speece -- he's talking about a conversation with Mr. DiSimone and he's saying that Speece had referred Frank Maiorana to Mr. DiSimone and after he says that, at the bottom of the page, Mr. DiSimone is supposed to have said, "Well, we're not in the business of selling cars to people who are going to resell them."

THE COURT: Where is this?

MR. KLEINBARD: Allegedly Mr. DiSimone talking to Mr. Maiorana, Frank Maiorana. This is the furthest they got.

THE COURT: What page?

MR. KLEINBARD: 461, your Honor.

THE COURT: What did he say?

MR. KLEINBARD: He said "Well, we're not in the business of selling cars to people who are going to resell them. Evidently you are going to put up a leasing company and you want a fleet certificate to buy automobiles.

I don't know whether I can go along with that, but he wanted to set up a meeting with me, and then Mr. Maiorana replied, as I believe I said earlier, "I don't have time to have meetings over this," and he did not meet with him.

This again is too equivocal to represent a threat or an admission on the part of General Motors. He says "I don't know."

THE COURT: Let me interrupt you a moment. I have a swearing in of a new judge at 2:15.

MR. KLEINBARD: I took Anthony out of order in order to answer your Honor's question. I was going to proceed but --

THE COURT: Let me ask you this: Has General Motors put together any kind of summary or chronological chart based on these books? You were going to do that, the big books.

MR. KLEINBARD: A9 thorugh E9?

THE COURT: Yes. It is impossible visually to grasp all those pages in one sighting unless I have x-ray vision.

MR.KLEINBARD: Are you talking now to be able to see the movement from one dealer to another?

THE COURT: In thinking about this case, and this would be true at any juncture I think, whether we are dealing with a motion to dismiss now or at any juncture. It seems to me that we have a group of statements allegedly made by General Motors personnel: English, Speece, etc. On a motion to dismiss we have to assume the credibility of the plaintiffs' witnesses.

MR. KLEINBARD: Right, your Honor.

THE COURT: You brought up the idea that even if you assumed the credibility for the sake of the case as a whole, one has to look at what happens after the alleged threat. I think inevitably you have to look at the alleged statement versus what happened, but my problem is having a handy tool to find out what happened; in other words, if I have a group of threats that occurred in different places around a certain date, or whatever we have in the way of threats, I would like to see the whole picture about what was happening around the time of those threats, if possible. You mentioned the Rohrer thing.

But what else was happening in the Philadelphia zone and elsewhere at about this time? Was this a time when everybody but Rohrer was refusing to sell? What was happening?

What I'm getting around to is this: I thought that the plaintiffs were going to take these books and wrre going to in some way trace the movements; am I mistaken?

MR. KAPLAN: We'll have it after lunch, and the answer to that specific question is that Anthony Maiorana has already testified about Chevrolet, and they were buying from Matt Slap in the early part of 1967. Slap never refused to sell; and in the summer of '67 they started to give business to Rohrer. They had no problem with Rohrer other than this alleged episode until 1970, and that was Chevrolet in Philadelphia. There was nothing else happening, your Honor.

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MR. KLEINBARD: I think that should be taken in conunction with the testimony that it was their desire to find a primary source for each particular location, so if they were able to get all the Chevrolets they could from Rohrer, there would be no occasion to go running around except on some odd car if they could get it from somebody else.

THE COURT: You are saying that the records and admissions of Anthony Maiorana show that Rohrer was the source in Philadelphia from mid-1967 on through when?

MR. KAPLAN: May 31. 1970, with a scattering they got from Slap. Among otherplaces, that is on Defendants' Exhibit J.

THE COURT: If I recall Anthony's testimony, he said that beginning in August or the Fall of 1967, whatever it was, Rohrer sold Chevrolets to Nabcor through the end of July, 1970, and then at some point Sloane started selling. I guess it was Sloane of Matt Slap got his own dealership and started to sell.

MR. KLEINBARD: That is correct, your Honor. That is the relevant point at this particular juncture we are now at.

MR. KAPLAN: Also I invite your Honor's

attention to page 1701 where Anthony Mariorana testified as follows:

"Putting aside the scattered instances you claim happened, it was true during the entire period from December, 1966, until the end of 1970, Nabcor could get all the new Chevrolets it needed from those three dealers, true?

"A I would say that is true."

That refers to Slap, Rohrer and Sloane.

THE COURT: What are the scattered instances?

MR. KAPLAN: The Cerota Chevrolet and the Stolarski Corvette and the Askew Corvette. I think those are the instances.

THE COURT: We go back to the tabulation from 699. If we are talking about a conversation in December, 1967, there isn't a single claim of non-delivery of a Chevrolet by the plaintiffs or by Nabcor from well before that December, 1967.

There is no claim as to afterwards, except the Askew situation.

MR. KLEINBARD: That is correct.

THE COURT: As far as whether it is the Philadelphia zone or whatever, you haven't any claim of

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non-delivery after that conversation, and indeed the last claim of non-delivery that you can really talk about would be some time in the Spring.

MR. KLEINBARD: I think, your Honor, all of these perjurative statements which we must assume for the sake of the motion are true, which took place after June of 1967, must be viewed against the background of the plaintiffs getting every car they ever ordered, as I said earlier.

Now, turning just for a moment to GMAC's involvement, which comes in ligically at this place, both Maioranas testified, each as to a portion of it, that Nabcor applied to GMAC for financing, and then through hearsay actually that GMAC denied the application because neither one of the Maioranas were in direct communication with GMAC with respect to the denial

THE COURT: We have the records in evidence on that,don't we?

MR. KLEINBARD: We have the application, which is Defendants' Exhibit A.

THE COURT: The records that came in yesterday relate to the fleet certificate, right, about the denial?

MR. KLEINBARD: I don't think anything came

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in with respect to financing, your Honor. There are only two exhibits which relate to financing.

One is the actual application on behalf of Nabcor submitted by the Philadelphia GMAC office recommending approval of the credit,which is Defendants' Exhibit A, which is not precisely consistent with conspiracy, and Defendants' Exhibit WWW, which was Mr. Frank Maiorana's personal financial guarantor statement, which certainly on its face raises questions sufficient for GMAC to at least question the guarantee.

But, in any event, the communication of the denial itself came, I believe, from Matt Slap or someone in his organization.

In any event, the naked denial of that application cannot sustain either an action against General Motors or an action against GMAC. That is GMAC's sole involvement in this case.

There is just no other evidence involving them, and certainly I think the law is clear that the intra-corporate conspiracy would not apply here unless the subsidiary, which is what GMAC is, is competing with the parent for the business of the same customer, which, of course, it does not.

So I think the motion to dismiss in any event, independent of what else I am going to say, has to be granted with respect to GMAC.

THE COURT: Is there any other incident, Mr. Person, that is claimed to have involved GMAC?

MR. PERSON: No, your Honor. I thought Anthony Maiorana testified to a conversation with Mr. Thomas of GMAC, and I thought there was testimony on that.

THE COURT: Thomas was the fellow who --

MR. KLEINBARD: He approved the recommendation, but I don't think there were any, your Honor.

THE COURT: Thomas was the fellow who approved the application in the Philadelphia zone. I don't have any notes of any threatening or any similar conversations involving Thomas at all.

MR. PERSON: The other part of this I guess -- in other words, GMAC had gotten into the act as a result of Mr. Belcher turning Mr. Maiorana over to Mr. Drury, and in connection with this, GMAC turned Mr. Maiorana back to Mr. Speece or Mr. Di Simone, so that the activities of Speece and Di Simone are part of the activities of GMAC.

They operated together. I think we should defer --

THE COURT: What do you mean, turned them back?

MR. PERSON: Mr. Drury from GMAC had Mr. Maiorana communicate with Mr. Di Simone and Mr. Speece so that the activities of Mr. Speece and Di Simone should be taken into account in connection with GMAC.

THE COURT: Have I got the chronology right? Speece and Di Simone are supposed to have called on Anthony shortly before the Belcher incident, the Belcher interview?

MR. PERSON: That is correct.

THE COURT: After the Belcher interview when there was an attempt to get the fleet certificate and to get financing for a small fleet of cars. Maiorana was referred to whom?

MR. KLEINBARD: First to Mr. Drury. He was, according to Mr. Maiorana's testimony, he was head of GMAC.

Then again, according to Mr. Maiorana's testimony, Mr. Drury referred him to Speece and Di Simone. This would be early in 1968.

THE COURT: I see that. Drury said that he would have to refer Mr. Maiorana to Philadelphia and gave him the names of Speece and Di Simone.

MR. KLEINBARD: Right.

2 THE COURT: Then Maiorana testified as to conversations with both Speece and Di Simone?

MR. KLEINBARD: That is correct. I just did that a few minutes ago, talking on the subject of financing.

THE COURT: Just reviewing that, Speece is supposed to have said, "You are bootlegging cars, we don't know if we can sell you cars, call Di Simone if you want to ask about a fleet certificate."

Maiorana called Di Simone and Di Simone is supposed to have said, "We are not in the business of selling cars to people who resell them, but I am willing to meet with you," and Maiorana said, "We won't meet," and then somehow Karney came up and left his card.

MR. PERSON: That was earlier, your Honor.

THE COURT: No, it followed, because after the conversation with Di Simone Maiorana says he called Belcher back and said, "I am not getting anywhere," and then Karney's card appears. Karney is in Fleet Section, right?

MR. KLEINBARD: That is correct.

THE COURT: And Karney talked about setting up a small leasing operation, and that led to the application.

MR. KLEINBARD: Which, I believe, is dated in February, 1968.

THE COURT: The application for credit.

MR KLEINBARD: Right.

THE COURT: At GMAC. How did we get off on all of this?

MR. KLEINBARD: Because I guess you asked whether there were any other contacts with GMAC. Mr. Person said he thought there was a conversation with Mr. Thomas.

THE COURT: What is your point?

MR. PERSON: That the activities of Speece and Di Simone --

MR.KLEINBARD: Have to be read into GMAC.

THE COURT: How?

MR. PERSON: Because Mr. Drury of GMAC referred Mr. Maiorana to Speece and Di Simone in connection with matters relating to GMAC.

THE COURT: If that is it, let us take our recess --

MR. KLEINBARD: Could I just finish that one point?

Whatever may have happened there, and of course obviously I am going solely on what Mr. Maiorana said happened rather than what the facts are, it is undisputed that Mr. Maiorana had direct communication with Mr.Thomas of the Philadelphia GMAC branch, which appears at 1637. The fact of the matter is that Mr. Maiorana got to where he should have gotten, namely, the Philadelphia branch of GMAC, and that is at page 1637, and he had a conversation with Mr. Hank Thomas in the Philadelphia area about getting a line of credit.

He says here there was an inquiry about a line of credit for rental cars and GMAC did not and does not work except through zone dealers in financing of automobiles or lines of credit.

THE COURT: Thomas in Philadelphia ended up approving the credit. Unless we are going to assume that GMAC was reached in Detroit, and through conspiratorial activities denied the credit application, then it seems to me there is nothing against GMAC here.

I don't see a link of evidence that GMAC in Detroit was reached by conspiratorial activity.

I don't think the fact that Drury referred them to Speece and Di Simone means that at all. I don't think the jury or anybody could infer that

Drury was employing Speece and Di Simone as his henchmen to convey threats.

I don't think there is any evidence to indicate that the people who turned down the credit application were reached by conspiratorial activities.

MR. KLEINBARD: It stops with the recommendation by GMAC in Philadelphia.

THE COURT: The line doesn't stop because in Detroit they denied it.

MR. KLEINBARD: I am talking about the evidentiary portion. There is no evidence for what happens post-Philadelphia approving it.

THE COURT: We will take our recess until a quarter of three.

(Luncheon recess to 2.45 P.M.)

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AFTERNOON SESSION
2:55 p.m.

THE COURT: I would like to consult with you about notifying the jury as to time.

At the very least it is necessary to have ample time for Mr. Person to argue in opposition to the motions. It seems to me that it may in fact not be possible -- I don't know how long you need, but it may not be possible for you to complete. What I'm thinking of is calling the jury now and telling them not to come in at all tomorrow or not to come in until a certain point.

How much more time do you believe you will need?

MR. KLEINBARD: Well, frankly, I'm not saying this in any attempt to discourage your Honor, but a lot depends on whether we have dialogue.

THE COURT: Going at the same rate.

MR. KLEINBARD: Going at the same rate, I am about a third through. My own personal view is that some of it has been gone over and it can be gone over again quickly, if necessary.

THE COURT: What would your recommendation be, Mr. Person? I think I owe the jury something.

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MR. KLEINBARD: In my own judgment, your Honor, you won't reach the jury by the afternoon of tomorrow. Mr. Kaplan has to deal with the Buffalo situation and the other plaintiffs.

THE COURT: We hope that Mr. Watson will be here tomorrow. I wish that someone in your office would keep him posted and make sure that he is down here tomorrow, even if he has to take the train.

I don't know what the weather is but he has to be here, and if flying conditions are bad, maybe he has to get in a car or something. I wish your office would tell him that he's absolutely expected here at 10 o'clock tomorrow. He's expected to arrange his transportation to make sure he is.

What do you suggest, Mr. Person?

MR. PERSON: Keep the day open entirely.

THE COURT: I think so. I don't think it makes any sense otherwise.

MR. KLEINBARD: It could not be before the afternoon, and that would be a short session.

THE COURT: I will instruct my secretary to call each of the jurors and the alternates and tell them they are to remain home tomorrow on the same basis that they were home today, and that they are to report at 10 o'clock Thursday.

Go ahead, Mr. Kleinbard.

MR. KLEINBARD: I was up to, coming to, Walter Gray in my recounting of GM personnel with whom the plaintiffs have testified they had some contact.

THE COURT: Mr. Who?

MR. KLEINBARD: Walter Gray.

Frank Maiorana testified that he met Walter Gray in 1966 at which time Mr. Gray indicated he was there to help Nabcor to apply for a GM fleet certifivate.

According to his testimony, and I'm referring to Mr. Maiorana's testimony, at their first meeting Mr. Gray said he knew Nabcor was reselling automobiles but that he was meeting with Mr. Maiorana to determine whether Nabcor had a sufficient number of cars registered in its own name to qualify for a fleet certificate. That's page 209.

As everybody knows, Nabcor did not qualify for a fleet certificate since it didn't have the required number of registrations. The application was ultimately denied -- not at either of the meetings with Mr. Gray but subsequent.

We would submit that here, again, there is no proof of any evidence that his visit and actions with respect to Nabcor, that is, Mr. Gray's visit, was a part of any conspiracy directed as to Nabcor.

THE COURT: But don't you have a threatening statement or an admission? Mr. Maiorana testified that Gray said something to the effect he knew Nabcor was bootlegging.

MR. KLEINBARD: He said reselling or bootlegging.

THE COURT: "Bootlegging" is an ominous term.

MR. KLEINBARD: I don't know whether it is a compliment or not, but the point is that he was meeting with him anyway to determine whether or not he had sufficient cars, according to his testimony, to see whether or not he could be granted a fleet certificate.

If the actual testimony --

THE COURT: What page?

MR. KLEINBARD: 209.

"Q Could you state what you said to him and what he said to you?

"A He started to ask a lot of questions about cars we had registered, whether we had any cars registered in my name. I told him no. I said we sold our cars through a brokerage system and we had been doing this. I was sure Earl Stewart had apprised him of this.

"He says 'Yes, I know you are selling these automobiles, or bootlegging them, and as far as we are concerned that's not what I'm here for. I want to know if you have any cars registered in your name.'"

I think that's the key sentence, your Honor, when he says "Yes, I know you are selling these automobiles, bootlegging them, and as far as we are concerned that's not what I'm here for. I want to know if you have any cars registered in your name."

THE COURT: This is a motion to dismiss and the thing I have to be concerned about is this: If you have even bits and pieces of evidence indicating an attitude on General Motors part that this is an undesirable activity and that they want to do something to stop it --

MR. KLEINBARD: This testimony takes you there. Obviously if he was there to get information about fleet certificates this testimony says he was, but despite that you just can't make that leap.

THE COURT: Couldn't you argue that the

reason they denied the fleet certificate was --

MR. KLEINBARD: He would not be there in the first place. He said, "I know you are selling these automobiles, or bootlegging them."

THE COURT: Unless it was a charade or something.

MR. KLEINBARD: We can speculate as to a whole variety of things, but as to evidence, your Honor, I don't think there is any evidence from which you can derive -- or any substantial evidence -- a satisfactory inference of conspiracy.

THE COURT: The problem is to see what is the range of the range of the relevant evidence.

This is a period of time which the plaintiffs lay great stress on, the period of late '66, early '67.

I think nobody could rationally contend that because Walter Gray talks about bootlegging that that makes General Motors liable or constitutes conspiratorial conduct or anything like that. I think is is useful to note that at that conversation no actual threat was made, even according to Mr. Maiorana's testimony.

Nothing was done or proposed in the way of conspiratorial conduct, so it's a kind of name-calling operation, at least as far as this conversation. But I think ultimately, and I think you will get to this in due course, the really deeper question is, what is the significance of all the evidence about these events of that period of time put together and including the bits and pieces, even this bit, whatever it is?

That's the way I think I have to view it because at the same time as you've got Walter Gray alleged to have used the word "bootlegging," you have got, and I'm sure you are goinv to cover this, O'Brien and Goldsmith of Paragon in December of '66 who are supposed to have made statements, Englert and his boss are supposed ot have made statements, and then you have the allegation of all of these refusals.

That's my problem.

MR. KLEINBARD: There are certain things that happened in '66 and certain things that happened a year later at the end of '67. That's quite true. I think there are less of them in '66 than there are in '67 in terms of conversations with GM employees.

In any event, that's the sum and total of what comes out of Walter Gray.

THE COURT: All right.

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MR. KLEINBARD: The conversations which immediately precede that meeting with Holzworth, Englert and MacMahon at the Park Shelton Hotel were totally innocuous. Mr. Maiorana claims that he explained his system to them and Mr. Holzworth, the Pontiac manager, said sell a thousand cars or as many as you can.

THE COURT: Going back for a moment to Mr. Gray, your argument would be that as far as the ultimate action taken, the refusal of the fleet certificate, that was simply in accordance with General Motors' policy?

MR. KLEINBARD: He failed to qualify in terms of the requirements of the system, that is right.

As I say, as far as the Holzworth, Englert and MacMahon are supposed to indicate anything, they are consistent only with a desire to sell cars, and there is absolutely nothing in that conversation of any kind.

That leads me to Mr. Lowe.

As far as Mr. Lowe is concerned, we are going to have to get to him sooner or later, and there was testimony concerning the ordering of Mr. Askew's Corvette which Nabcor allegedly order from Matt Slap, and I underscore "allegedly ordered" because I will come back to that.

Mr. Maiorana claimed Mr. Lowe told him basically four things: that GM was not supposed to sell him automobiles; that GM was not in the business of selling cars to resellers; that GM was not supposed to supply its cars to people who would resell them, which is pretty much the same thing, and if Mr. Askew had gone to a regular dealer he would have received his car.

Our position as to the alleged Lowe conversation is that even if what Mr. Maiorana claims he said was said to him, it doesn't amount to evidence of conspiracy for the following reason:

Mr. Maiorana's first conversation with Mr. Lowe, according to the evidence, took place on June 31, 1969. That is page 1343 and 44.

THE COURT: The first what?

MR. KLEINBARD: The first conversation with Mr. Lowe direct took place on July 31, 1969. That is page 1343 and 44.

THE COURT: Right.

MR. KLEINBARD: Mr. Askew had already cancelled by several days before his order with Nabcor by a letter dated July 28, 1969, which is in evidence, Defendants' Exhibit TTTT.

In addition to that, there are certain circumstantial things --

THE COURT: Is the July 31 date really that firm?

MR. KLEINBARD: Well, your Honor, the pretrial brief places it there. Mr. Maiorana placed it there in response to questioning.

The only prior date mentioned in which Mr. Lowe is mentioned at all is AAAA, at which time -- that is one of the letters, one of the Department of Justice or some other people in Mr. Maiorana's complaint.

And in that letter what you have is Mr. Wright saying that he had told Mr. Maiorana -- Mr. Wright of Action Line saying he told Mr. Maiorana that he, Mr. Wright, had spoken to Mr. Lowe. That is on July 11. That is the very first mention of Mr. Lowe in the record at all.

There is nothing to cause anybody to disagree with the date July 31, 1969. Indeed, if I recall correctly, there is a letter dated August 1 or August 2nd to the Department of Justice following the conversation with Mr. Lowe, in which a lot of attention is paid to the fact that Mr. Lowe was seeking to locate the Corvette on the basis of leather upholstery. No mention of the fact that Mr. Maiorana claims to have told Mr. Lowe the name of the dealer.

But that is besides the point. My point is I think I am quite safe in fixing the date at July 31, and as of that time the Corvette is already cancelled.

THE COURT: The letter is dated July 28, the cancellation letter, right?

MR. KLEINBARD: That is correct.

THE COURT: Am I to conclude that the letter was received -- who was it to?

MR. KLEINBARD: The letter was to Nabcor, so that anything Mr. Lowe said or did, if he said or did anything, certainly there is no evidence that he did anything. But just to take his perjurative remarks and assume they are true, they could not have brought about a cancellation several days before he had a conversation.

THE COURT: Well, I guess the idea would be that Lowe again is making an admission.

MR. KLEINBARD: He is not making an admission with respect to anything specific about this car.

He merely says, I think in general terms, we are not supposed to be selling him automobiles, we are not in the business of selling cars to those who resell them, and if he had gone to a regular dealer he would have gotten the car. Despite that, according to Mr. Maiorana's letter of August 2nd, you have Mr. Lowe trying to locate the car for Mr. Maiorana, and the only criticism Mr. Maiorana levels is that he doesn't very much of the manner in which Mr. Lowe is going about it.

But again these two things: one, the car is already cancelled, TTTT shows that, and the letter of cancellation is confirmation of a telephone conversation which preceded it, dated July 24.

Then you have the alleged conversation on or about the 31st with Lowe, with certain perjurative remarks which couldn't have brought about the cancellation, and then you have the letter of August 2, and that is ZZZ, when Mr. Maiorana himself says he spoke on July 31, the precise date, he spoke to Mr. Lowe of the Chevrolet Region.

Here he has Mr. Lowe attempting to trace the car, giving a number of things he was going to do in order to trace the car.

Whether Mr. Maiorana thinks well of that procedure or not, I think it is beside the point. It is inconsistent with boycott or evidence of conspiracy.

THE COURT: Let me just see. The testimony of Mr. Maiorana on direct was something to this effect: the final analysis, Lowe said that Nabcor was not going to get the car. The result was the sale was lost and the dealer was lost. What is your argument?

MR. KLEINBARD: He is just in error. He had been lost before he spoke to Mr. Lowe.

THE COURT: Who was Mr. Lowe?

MR. KLEINBARD: He was with the Chevrolet Motor Division located at that time at Chevy Chase, Maryland.

THE COURT: If the car was ordered from Matt Slap, Matt Slapis up in Philadelphia.

MR.KLEINBARD: On that, your Honor, you may recall there has also been testimony -- I think you are going to the 3rd count, are you?

THE COURT: I am not worried about the 3rd count at the moment. I guess the easier way -- Mr. Person, what is the claim as far as the Askew trans-

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action and Mr. Lowe? What is the significance?

MR. PERSON: That is continued inaction or inability to get the car lost us our broker and also the sale.

A sale isn't lost solely because the customer cancelled. There is a period of time in which you can still sell the car to the customer before he could order it elsewhere.

THE COURT: You don't contend Lowe knew about the problem before being called, whenever it was?

MR. PERSON: No, your Honor.

THE COURT: So your claim, you have defined it. Let me make a note.

MR. PERSON: He found out only after Wright got into the act. He wasn't responsible for Wright getting into the act. Lowe did not originate the communication with the Washington Evening Star.

THE COURT: I am not concerned so much about that. I take it your claim is that Lowe failed to take action after he was apprised of the problem?

MR. PERSON: Correct.

THE COURT: Not that he was the originator of the problem?

MR. PERSON: Correct, your Honor.

THE COURT: I will ask you one more question, Mr. Person, and you can answer this or think about it overnight. When do you claim Mr. Lowe was alerted to a problem?

MR. PERSON: As soon as Wright communicated with him. I believe that Wright communicated with Lowe and it was through Wright that we found out that Lowe was the factory man who told Wright we wouldn't get the car. That is hearsay.

THE COURT: But as far as the timing when Lowe was alerted, you say that occurred when Wright --

MR. PERSON: Before the cancellation.

THE COURT: When do you claim that is, approximately?

MR. PERSON: I have to go back, but it would have been within two or three weeks. The whole thing happened within a month.

THE COURT: At least what Mr. Person is saying, is that he doesn't claim that the alerting of Lowe merely came in some July 31 conversation of Frank Maiorana, that it occurred earlier.

MR. PERSON: Yes, your Honor.

THE COURT: What about that, Mr. Kleinbard?

MR. KLEINBARD: Well,as to that, No. 1,

I guess we have to jump over the hearsay as to whether or not there is any competent evidence as to when Mr. Lowe learned, because the first time there was any direct communication is as of July 31.

THE COURT: Isn't there some evidence about when Wright talked to Lowe?

MR. KLEINBARD: I am looking at the letter now, your Honor. The only evidence I can recall is the letter of July 11, in which Mr. Maiorana, in writing to Mr. Kuman of the Department of Justice, Exhibit AAAA, says that he had had conversations with Snyder and Wright and that he had spoken to Wright, who told me that he spoke to the Washington Regional Office of Chevrolet and spoke to the manager, Mr. Lowe.

There is no particularization of any date there, so I can't place it better.

THE COURT: It must be before July --

MR. KLEINBARD: Shortly before, I imagine, July 11.

THE COURT: Is that letter evidence of the fact or just on a limited basis?

MR. KLEINBARD: On a limited basis. I use it actually, I believe, to impeach Mr. Maiorana as to when this conversation took place.

THE COURT: You did not introduce it to prove the fact of when Wright talked to Lowe?

MR. KLEINBARD: That is correct.

THE COURT: You think about this overnight, Mr. Person: what is the evidence as to the date when Wright talked to Lowe?

MR. KLEINBARD: I also think that a reading of ZZZ, the letter of August 1, will show the General Motors people to whom Mr. Maiorana made a good faith effort to locate this car, and then perhaps the most significant thing of all is that, according to Mr. Maiorana's testimony, Matt Slap,the dealer, took the position that it had not submitted the order to Chevrolet because it hadn't received a deposit from Nabcor, which no doubt explains why GM had such difficulty in finding the car.

THE COURT: Well, I think beyond all of that, it would seem to me if we are talking about a conspiracy existing in the Summer of 1969, we are going to have to look, and I am sure we will, at the overall picture of cars delivered in the Summer of 1969 and so forth.

MR. KLEINBARD: Your Honor, if you will look at it as a graph, there is a continuing line going right through this period saying that Nabcor got every car it ordered with the exception of this car that we just mentioned. I don't want to keep repeating that, but that is true throughout this period.

THE COURT: I thought we were going to get all these graphs after lunch.

MR. KLEINBARD: There are some graphs here. I don't know whether they are ready for submission or not.

MR. KAPLAN: We still have work to do on the Buick. Otherwise, I have one copy each of the other four.

THE COURT: I can get them Xeroxed.

MR.KAPLAN: Fine.

MR. KLEINBARD: That completes, your Honor, all of the particular General Motors employees with whom the plaintiffs have claimed to have had conversation.

I would now like to turn to whether the evidence will permit the inference that GM conspired with any individual dealer or group of dealers --

THE COURT: Wait a second now. Englert was an employee of General Motors, wasn't he?

MR. KLEINBARD: I am going to treat Englert, Marcen and Douglas in connection with the individual dealerships, your Honor. They will come up in this discussion.

I would like first perhaps to deal with plaintiffs' argument which was conceived at the side bar last Wednesday, recently late in the game,to the effect that there was --

THE COURT: I am sorry, I just want to make sure that we have covered all of the alleged statements of General Motors personnel indicating a conspiracy. I think there was a Mr. Redmond.

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MR. KLEINBARD: Redmond, your Honor, came up in connection with the Rev. Kelly.

THE COURT: Redmond says that Nabcor was not an authorized dealer, no fleet certificate. I don't know what this adds up to.

MR. KLEINBARD: I don't think it adds up to anything but it ends up with him getting his exemptions, the religious exemption.

THE COURT: It has to be dealt with. I can't deal with a motion to dismiss without dealing with every nook and cranny as far as these statements by General Motors' employees are concerned.

Who has been covered? I want to know if Mr. Person contends there areany statements by way of threats, admissions, or anything else where there is evidence of such statements on the part of General Motors employees in any way that's admissible, either direct testimony by Mr. Maiorana or somebody saying he heard these employees speaking, orwhether it comes in in some other conceivable fashion.

Let's pause a minute.

MR. KLEINBARD: Shall I list them for you?

THE COURT: Just a minute.

(Pause)

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THE COURT: You have covered Belcher.

You have covered Karney.

MR. PERSON: We have a correction on Karney. He did not lead into the GMAC problem. Karney was always fleet certificate and had nothing to do with GMAC.

THE COURT: I think that's correct.

We have Speece and DiSimone covered.

MR. KLEINBARD: Drury and Fogg.

THE COURT: Fogg was one of the people at the Karney meeting?

MR. KLEINBARD: Correct.

THE COURT: Didwe cover Drury?

MR. KLEINBARD: Drury merely referred Mr. Maiorana to Speece and DiSimone, according to him.

THE COURT: ARe there any statemens by Drury by way of admissions or threats of the kind we have talked about?

MR. KLEINBARD: Not to my knowledge, your Honor.

THE COURT: We have covered Walter Gray.

MR. KLEINBARD: I think we might as well say Hank Thomas as well, although he's with GMAC.

THE COURT: I don't think there is any

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contention he made threats or admission.

We have covered Mr. Lowe.

MR. KLEINBARD: On Redmond, as long as you have raised that, at page 609, that's the testimony in connection with Rev. Kelly. Redmond is supposed to have said first in connection with an excis e tax refund the following:

"We were not an authorized dealer and we didn't have a fleet certificate."

Both of those things are correct. It does not seem to me to be something to be conceived of as a threat of any kind.

Then, frankly, Mr. Maiorana confused the excise tax refund with the warranty because if you go on to read the rest of that page he says:

"We were considered the original retail purchaser and he was the second buyer and as such was not entitled to the excise tax refund."

The very next sentence:

"So I debated this point with him. I believe I told him that their warranty states," and he goes on to a discussion of warranty and second owners, and we get back to the water pump, which is actually what he's referring to at that point.

THE COURT: In other words, as far as Kelly is concerned, he got his excise tax back?

MR. KLEINBARD: There is confusion in the testimony here. As to the warranty, we have been through that already with Mr. Kaplan. The Reverend was either beyond the milage or the time limitation or both.

THE COURT: This was in August of 1970?

MR. KLEINBARD: Correct.

THE COURT: Let's pass Redmond.

MR. KLEINBARD: Just to get them out of the way I'll take Midtown --

MR. PERSON: Excuse me. Let me suggest a couple of additional names for completeness at this point: Gabevatiz, Calan and Ziebold's brother-in-law.

THE COURT: I don't think we have any testimony remaining on the record about Ziebold's brother-in-law. It was stricken.

Calan?

MR. KLEINBARD: That's in connection with Lowe.

THE COURT: And the other name?

MR. PERSON: Gabevatiz.

MR. KLEINBARD: Also in connection with

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Lowe. All mentioned in the August 2 letter.

THE COURT: Did Calan make any threats or admiasions?

MR. KLEINBARD: Not on this record, your Honor.

THE COURT: I don't think there is anything in there.

MR. KLEINBARD: It was in the preliminary hearing, your Honor.

THE COURT: I don't believe there is anything about Gabevatiz either. At least for completeness --

MR. KLEINBARD: There are a number of others but they will come up in connection with the discussion with these particular GM dealers.

As I started to say, I wanted first to deal with the plaintiffs' argument which was conceived of virtually moments before he rested last Wednesday at the side bar to the effect there was a series of cessations or refusals to deal in the period of late '66 and early '67, which constituted the bulk of Nabcor's difficulty.

Again, I don't want to keep stressing it over and over again, but that seems to me to be the primary answer: Whatever death throes or chaos, or whatever, they are supposed to have had during this period, it was very rapidly thereafter overcome by a whole series of dealings in cars which remained right on through the damage period.

THE COURT: Let's take this thing of the fall of '66.

MR. KLEINBARD: I'm going to take them dealer by dealer.

I cannot find any competent evidence in the record that General Motors -- he has mentioned a series of dealers. The first is Luby Chevrolet, and Midtown, and then Degnan.

Let me deal with Luby and Degnan together. I don't find anything in the record that points to the fact that GM had anything to do with the cessation or refusal to do on the part of either Luby or Degnan.

THE COURT: Luby is where?

MR. PERSON: Queens.

MR. KLEINBARD: It's a New York dealership, your Honor.

THE COURT: And what is the other one?

MR. KLEINBARD: Degnan is in the Philadelphia area, I believe.

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As I say, I can't find anything in the record to indicate a connection with General Motors with whatever happened to Luby and Degnan.

THE COURT: I think this is a situation where the claim would be that there was a sufficient number of instances and that that would provide enough circumstantial evidence to go to the jury together with maybe a few statements, and that the jury could infer that there was conspiratorial activity by someone at General Motors, and the plaintiff would say that the someone doesn't have to be identified; and that this all adds up to an odd and non-innocent situation.

I guess what we have to do -- and maybe those charts will help us -- is to get the whole picture analyzed for that period of time.

MR. KLEINBARD: You'll find, I think, your Honor, that Nabcor was able to get supplies just as rapidly as they stopped dealing or ceased dealing with anyone of these particular dealers.

THE COURT: I know we did this one day, but-- if we're talking about late '66, early '67 and we're talking about the claimed refusals in Exhibit 699 for identification, a great many of them were Cadillacs ordered from Colonial. A great many of the alleged refusals were ordered from Colonial.

For purposes of discussion I would like to put aside temporarily the Colonial Cadillac claims. I would like to review what the situation is on Chevrolets, Pontiac, Buicks, and Oldsmobiles in this period of late '66 and early '67.

MR. KLEINBARD: Chevrolets, you first have Luby dealing with Nabcor from in November, nine Chevrolets delivered; December, two. In January there is a Chevrolet delivered from Matt Slap.

THE COURT: What is that exhibit?

MR. KLEINBARD: This is what your Honor asked us to prepare from the --

MR. KAPLAN: Youcan follow it along because what it is is just a chronological listing of the cars with uniquely identifiable serial numbers by delivery date from Defendants' E9.

THE COURT: What is the exhibit that has the Philadelphia --

MR. KAPLAN: J, your Honor.

MR. KLEINBARD: It is easier to follow on the Xeroxes, your Honor.

MR. KAPLAN: I think you will also want F, your Honor, which is the New York area.

THE COURT: So Luby is obviously in the New York area. Was there a New York zone?

MR. KLEINBARD: Yes,your Honor.

THECOURT: And Slap is, of course, in the Philadelphia zone?

MR. KLEINBARD: Yes.

THE COURT: The dealings with Luby start June 30, 1966, according to Exhibit F.

MR. KLEINBARD: They continue through November.

THE COURT: I want to get the summary of Mr. Person's claims. What is the first Chevrolet transaction complained about?

MR. KLEINBARD: I think,your Honor, the first Chevrolet is Midtown.

THE COURT: That's right. The first Chevrolet complained about is order No. 133, ordered from Midtown.

MR. KLEINBARD: There is a whole series of Midtowns.

THE COURT: We did go into this the other day.

As far as 1966 orders, the complaints about Chevrolets are with respect --

MR. KLEINBARD: After Midtown, your Honor, would be one from Luby.

THE COURT: Just one second.

(Pause)

THE COURT: What I'm trying to do, I know there was this problem as to all of the Midtown cars. We have evidence about that. I think that embraces a total of nine, eight regular Chevrolets and one Corvette, all 1967 models, all orders placed in late 1966. That's one batch.

MR. KLEINBARD: Right.

THE COURT: In addition to that, we have complaints about some other Chevrolets, and I think this really relates to two orders placed with Luby. These orders were placed in 1966 and that's order 200 and order 229.

MR. KLEINBARD: As to those two, your Honor --

THE COURT: That's early '67 when you have an order from Luby, which is complained of. That's 239.

If I am correct I think we have all the complaints about Chevies in mind now in late '66 and early '67 except possibly a couple of orders in the late spring from AC Cheveolet, and we'll put those aside for the moment too. I think that's a special case.

Let's put the Luby situation in context. How many did they get from Luby?

MR. KLEINBARD: They refused 14 cars from Luby ranging from June of '66 through February of '67; so that I think the significant thing is that you have delivereies here following the period when the plaintiffs, I think, would be arguing there would be some kind of across the board cessation of dealing.

There is a hiatus in the month of January but in February they pick up again and get two further deliveries.

As to the cars you mentioned, the three so-called problem cars which are Luby order --

THE COURT: I missed something. The total number of cars bought from Luby is what?

MR. KLEINBARD: 14. The first one is in June of '66. As soon as those charts come down you will be able to follow this much easier.

The first is in June of '66. The next set of deliveries are nine deliveries in November of '66, which is right at or about the time when these problems are supposed to have arrived. Then there are two in December of '66. There are none in January, and then there are two in February.

THE COURT: Is that the end of the dealing with Luby?

MR. KLEINBARD: Luby continues on into '70. In June of '70 there are two more Chevrolets and in July of '70 another Chevrolet.

THE COURT: So you have it from June '66 through early February '67, and then you have some transactions in 19 --

MR. KLEINBARD: Sporadic transactions thereafter.

THE COURT: The only ones are in 1970; is that right?

MR. KLEINBARD: That's right. Two in February. You may not have heard, your Honor. There were two in February and then over again in June and July of '70.

In between, however, of course, they found supplies from other Chevrolet dealers.

THE COURT: The cars complained of, how do they fit in and what other arguments?

MR. KLEINBARD: They're on order log No. 200, which is the first of the cars you mention. We have no record of cancellation.

THE COURT: The log says it's cancelled?

MR. KAPLAN: No, your Honor.

THE COURT: What does Mr. Person's sheet about 200 say?

Mr. Person has on his sheet that there is an indication of cancellation in log 30040-24.

MR.KAPLAN: I have it right in front of me and he's mistaken.

THE COURT: What about that, Mr. Person?

MR. PERSON: I agree with that statement. I do not have that.

THE COURT: I'll just X this out and initial it.

MR. KLEINBARD: As to the next two, your Honor --

THE COURT: I'll mark correction on rcord, today's date.

In any event, the order was placed in November at a time --

MR. KLEINBARD: When they were geting non-delivery.

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THE COURT: The next one.

MR. KLEINBARD: 229 and 239. Our information is those were delivered by Matt Slap. The cars were obtained from Matt Slap.

If you look at 00053, the upper righthand corner says "Order placed with another GM dealer, Matt Slap, and delivered 2/9/67."

With the succeeding ones, there is 00058, the same type of thing, placed with another Gm dealer, Matt Slap, ordered February 3, 1967, delivered 3/14/67.

THE COURT: All right. 229 was originally ordered from Luby in December?

MR. KLEINBARD: We don't know the circumstances under which it was switched. All we know is it was ordered with another GM dealer.

The only thing we do know, it was apparently switched on February 3, and two cars were delivered by Luby in February after that date.

THE COURT: What do you contend about the two cars, 229 and 239, that were originally ordered from Luby and delivered by Slap. The log indicates, I guess, that there was a cancellation, some cancellation was somebody, according to Mr. Person's writeups.

But what cancellation do you contend was made, Mr. Person, and what is the source of it?

MR. PERSON: That whatever orders were on at the time, that is, some cars that had been ordered were delivered and others were cancelled. These orders that were cancelled had to be replaced.

THE COURT: Who cancelled? Does the log say cancelled?

MR. KAPLAN: No, your Honor.

MR. PERSON: It indicates, I believe, --

MR. KLEINBARD: There is a check on these sheets that is cancelled, in the log.

MR. PERSON: The indication of writing over the name Luby and placing it with Matt Slap.

THE COURT: Look, you have to get down to understanding what is meant by cancelled. A lot of people can cancel. It seems to me it is one thing if a car is ordered from Luby and Luby calls and says "We cancel this order, we will not fill it."

It is another thing if Nabcor cancels for some reason. Maybe it could be cancelled for delay, because the customer cancels.

That brings us to another possible cancellation,that the customer of Nabcor cancelled or the broker cancelled.

MR. PERSON: This was a Luby cancellation. It is in the record, only two pages of Luby testimony, that is, about Luby.

But it was hearsay situation and it was just that they had --

THE COURT: Let's start with the log. Does the log say somebody cancelled?

MR. PERSON: It says -- the word "cancelled" is not written here, but"Luby Chevrolet"is crossed out and"Matt Slap" is above it.

THE COURT: I am going to change your sheets on 699 to read as follows, I will say "Log shows Slap written over Luby."

Is that all right?

MR. PERSON: Correct, on 229.

THE COURT: And there is another one.

MR. PERSON: 239 was the same crossing out and rewriting the name "Matt Slap," but there is a date. The date is crossed out at which the order was placed with Luby and 2/3/67 is entered above that.

THE COURT: It does seem to me that a jury could infer that it was not Nabcor that cancelled, it

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was Luby that cancelled, could they not?

MR. KLEINBARD: Well, I don't see how, your Honor. I mean, the situation is at least as far as the record is concerned here, it certainly is ambiguous.

The testimony is that Luby cancelled in March of 1967. That is on page 258.

THE COURT: Whose testimony is that?

MR. KLEINBARD: Frank Maiorana. But without any particular circumstances.

THE COURT: It seems to me despite all the hearsay problems, that someone of the plaintiffs with knowledge could have testified to this much, that we cancelled or they cancelled.

MR. PERSON: The latter, your Honor.

THE COURT: Did anybody testify?

MR. PERSON: Frank Maiorana.

THE COURT: On those two cars?

MR. PERSON: The testimony was that Luby Chevrolet cancelled and his opinion or statement was that it was in March of 1967, when it was actually according to the record, in February.

THE COURT: So you will argue that the cancellation, the termination of business, the jury could find, took place at that time?

MR. PERSON: Correct, your Honor.

THE COURT: And that it was Luby who cancelled, if they believe Frank Maiorana's testimony, and that what happened was that part of it was the failure to fill these orders, and the resulting requirement to go to Matt Slap?

MR. PERSON: Correct, your Honor. Page 257, 258, it went down in March, 1967, and the order is not received. That is a quick summary of those two pages.

MR. KLEINBARD: There is no testimony about cancellation or termination. It is merely they put in the order and didn't get those cars. It could be explained by a number of things, including the fact that it was the beginning of their dealings with Matt Slap, which may have happened independent of anything on the part of Luby Chevrolet.

They may have gotten a better deal or what have you with Matt Slap and preferred to place that business with Matt Slap because they continued thereafter to deal with Matt Slap for a period of time.

MR. PERSON: The record is that Luby terminated.

MR. KLEINBARD: I don't see how you can say there is a termination.

THE COURT: Mr. Kleinbard, did you probe this with Mr. Maiorana? Did you ask him whether they were getting more favorable terms with Matt Slap or they were getting a better price or something that caused them to go to Matt Slap?

MR. KLEINBARD: This was very early in Mr. Maiorana's examination and this whole theory that they are now contending hadn't been created, and there was no basis, - about a half-page in the record here or a page, a full page on Luby Chevrolet, and there was no reason to cross-examine as to Luby Chevrolet.

MR. PERSON: The book gave him plenty of warning of what the testimony would have been. He had plenty of notice what the testimony would have been had it not been limited because of our ruling.

THE COURT: The fact is it wasn't probed and let us just take this shift from Luby to Slap which occurred at that time.

Is there any specific evidence in the record as to why Luby stopped dealing?

Let's assume that the jury could find that it was Luby who terminated and not Nabcor. Let's assume that, Mr. Person.

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I am asking you now or either now or consider it overnight, what evidence there is as to the reason why Luby terminated? I mean evidence of a direct nature or evidence that is circumstantial, whatever. Okay?

MR. PERSON: Fine, your Honor. I would say there wouldn't be any statement by any of my witnesses as to what Luby gave as the reason for the termination because of the rulings that we have prohibiting --

THE COURT: I understand that. I want you to think about what circumstantial evidence there would be, because that is just as good evidence as direct.

I think we will wait for those charts.

(Pause.)

2 THE COURT: Let's see what the charts are. Are these deliveries or what?

MR. KLEINBARD: The charts are deliveries, your Honor, on the dates indicated -- in the months indicated.

THE COURT: Where does this come from?

MR. KAPLAN: These, your Honor, are deliveries of cars for which we have separate, unique serial numbers from the books that we have marked as A-9 through E-9, and in each case they add up to the minimum number of deliveries on those exhibits, with one exception that we have discovered within the last day or so, that there should be four Chevrolets less, 1967 Chevrolets.

The reason being that Nabcor was actually invoiced for four of the Mid-Town Chevrolets which they subsequently cancelled and the invoices were put into the computer. So we can manually make that correction and we have done it on these sheets and we can do it in those.

THE COURT: E-9 should be corrected?

MR. KAPLAN: Yes. There are four Chevrolets from Mid-Town to Nabcor because the invoices were actually issued.

THE COURT: What do I do? I have E-9 in front of me.

MR. KAPLAN: Do you have the summary sheet?

THE COURT: Yes.

MR. KAPLAN: In Column 3, serial number listed, I believe the number should be reduced from eight to four for 1967.

THE COURT: Does that do anything to the others?

MR. KAPLAN: The numbers in the last two columns should be reduced to 41 and 67, respectively.

THE COURT: How about those overall summary sheets?

MR. KAPLAN: S-8 is also affected in a similar fashion. It is on the Chevrolet line and just subtract four from the same three columns that we just subtracted from.

In the third column, 109 rather than 113, and the last two columns, 154 and 182, respectively, and the totals at the bottom should be reduced accordingly.

THE COURT: In other words, the charts you have just given me reflect merely the different serial numbers?

MR. KAPLAN: Yes, by delivery date.

THE COURT: What aboutother deliveries?

MR. KAPLAN: We don't know what those cars are.

THE COURT: You know the dates.

MR. KAPLAN: In some cases we do and some cases we don't. It depends on whether they wrote it in the log. All of that is in A-9 to E-9, but in terms of getting a broad picture of what is happending, this is the best we could do on this notice.

MR. KLEINBARD: As I understand it, your Honor, the picture may be better than what appears here, but it can't be worse.

THE COURT: Let's just take the three problem Luby cars, that was car No. 200 ordered in November, and a time when there were non-deliveries as we have noted, and you can see it on the chart.

MR. KLEINBARD: Right.

THE COURT: We don't know what happened to this order 200.

As far as 229 and 239, they were ordered in December, and at that time Luby was delivering two cars and delivered another two in February, but these were changed over to Slap, presumably, in February.

MR. KLEINBARD: That is right.

THE COURT: And you have two deliveries by Slap beginning in March, '67, and some deliveries by A.C. Chevrolet beginning in April, 1967, and you have deliveries by Rohrer beginning in August, 1967, and I guess Rohrer pretty much takes over from Slap.

MR. KLEINBARD: That is right, and it goes on through July of 1970.

Just to finish the Chevrolets, I think we have been over the Mid-Town situation exhaustively, your Honor.

THE COURT: The only thing is that obviously at the preliminary hearing you introduced a good deal more evidence than has been introduced at this trial because you put on your defense. So I think it would be good to summarize the Mid-Town thing.

MR. KLEINBARD: The Mid-Town situation here is that you have some perjurative statements here first by Englert and allegedly by Englert's unnamed boss followed by a discovery of the letter of November 2 and an agreement to honor the orders at the original price and during the back and forth between Mid-Town and Nabcor, Nabcor ultimately cancelled eight out of ten or eight out of eleven, depending on how you view the testimony. It is not always totally consistent.

But we would say that that may amount conceivably, although I think it would be stretching it to a breach or contract action. But there is certainly no basis for concluding it was part of a conspiracy, because as a matter of law GM couldn't conspire with itself, Mid-Town being itself at that point. It is an unincorporated branch of General

Motors and you would have to go to something beyond what took place at Mid-Town before you could get any inference whatever.

THE COURT: Are you sure that as a matter of law there cannot be a conspiracy between General Motors and Mid-Town?

MR. KLEINBARD: Yes, your Honor.

THE COURT: It is not another corporation?

MR. KLEINBARD: It is an unincorporated branch, I don't think it is a division. It is just a factory-owned dealership, of which there is a couple in this record.

THE COURT: Again, though, I think I have to consider this problem at this time obviously from the overall context to see whether the statement by the -- the alleged statements by the people at Mid-Town aren't some evidence of a broader conspiracy than just Mid-Town.

MR. KLEINBARD: You do, your Honor. I would say that if you really had something widespread and substantial and if there was a really turning off of the spigot for any substantial period of time, you might draw an inference, but none of those situations are present here.

THE COURT: I don't want to interfere with your order, but I want to get it. Here is what my notes show as being Frank Maiorana's testimony about the cutoffs or refusals to deal in late '66 and early 1967.

You have the Mid-Town situation.

MR. KLEINBARD: Right.

THE COURT: You have the claim about Luby. Did he mention Degnan?

MR. KLEINBARD: I believe he did, your Honor.

THE COURT: You claim Degnan refused to deal because of a conspiracy?

MR. PERSON: That was an earlier transaction, that occurred July.

THE COURT: 1966?

MR. PERSON: Yes. It came in as a result of some warranty problems subsequently.

THE COURT: I think I am going to put Degnan aside as far as the boycott conspiracy.

Now, going back, it leaves Mid-Town, Luby and I think two other companies which are allegedly involved in late 1966, early 1967, Ruckel and Paragon.

Two other companies mentioned were Pensky and Norton Chevrolet, but that was before the statute of limitations.

MR. KLEINBARD: That is outside the period.

THE COURT: I will exclude consideration of that.

Then I think there was some problem about Paul Batt Buick in 1967?

MR. PERSON: Late 1967, early 1968. That is the Electra.

THE COURT: Up in Buffalo, so it is early 1968, early 1967 or early 1968.

So to repeat for the fifth time, I think that the companies involved in late 1966, early 1967, time period are Mid-Town, Luby, Ruckel, Paragon and Colonial, which we have put aside for the moment.

MR.KLEINBARD: Right.

3 MR. PERSON: I am not trying to be complete, but Bates Pontiac and Rosenstock.

MR. KLEINBARD: Your Honor, Rosenstock Olds was mentioned and then Sharkey, which later became Cunningham Buick, but the pages are 3256, 3261 of the testimony.

THE COURT: I will just add to the list Bates Pontiac.

MR. KLEINBARD: I don't have a reference to Bates.

MR. PERSON: Chief Pontiac is another.

THE COURT: These people are just thrown in, but I don't have any notes of any testimony.

MR. PERSON: That is why I wanted to look at the record and make sure myself.

THE COURT: Mr. Maiorana said that he complained to Belcher about Chief and that he complained to Belcher about Bates and some company called Grand and some other companies, but I do not know of any testimony by him as to an actual problem with either Bates or Chief or this Grand Company. I don't even want to raise it because you haven't even mentioned it in the last few minutes.

MR. PERSON: Grand Ford, your Honor.

THE COURT: We don't have to worry about that.

(Pause.)

THE COURT: You could borrow the record again tonight, Mr. Person, and call my attention to any testimony of Mr. Maiorana or anybody else about a problem with Bates or Chief. I don't think Chief is mentioned. I don't think there is any mention of a refusal by Chief in your Exhibit 699. As far as Bates, your complaints about Bates, I think you better look at that also. I don't think there is any testimony by any of the plaintiffs on that.

As far as the statistics in your 699 exhibit, you have got Bates doing pretty well by Nabcor, eight of them were delivered by Bates. Apparently you went over the Bates.

I think your submissions indicate that there were two cancellations of orders placed with Bates in the late spring of '67 but no indication of who did it.

I want to know if there is any record that indicates any reason to talk about Bates.

Rosenstock Olds, my clerk has provided me with her statistics based on your statistics, and she says that hte only Rosenstock problem in your listing, Mr. Person, is 322, and there was no cancellation, just a refusal to accept the order. I don't know what [illegible].

happened. That was in late May of 1967, sometime about then.

All I'm saying, Mr. Kleinbard, is that there obviously are some main problems and maybe some peripheral problems that have to be dealt with, but I think you have touched on Luby, Midtown, and --

MR. KLEINBARD: I have not yet touched on Ruckle or Paragon.

THE COURT: And we have deferred Colonial.

MR. KLEINBARD: On Ruckle, your Honor, there has been a fair amount of testimony. Ruckle was one of the few dealers actually called. After trying to sort out the testimony there I come up with the following as sort of the bottom line:

During a social visit with Dillon, Mr. McNamara, who in the testimony at least remained unidentified but is concededly a GM employee, asked Dillon what he knew about Nabcor because ofa proposed investment in a Nabcor franchise by McNamara's brother-in-law; following this visit, Dillon, who apparently was uninformed about it prior thereto, asked Stewart what he knew about Nabcor, and learned about the Nabcor operation and that Ruckle was selling cars to Nabcor.

On the basis of what Stewart told him it was

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Dillon's opinion that Nabcor was a franchise ripoff business with which he didn't wish to have any further business dealings.

I think the plaintiffs would like to have the jury speculate that Dillon's action was motivated by some conscious desire on the part of GM to refuse to deal with Nabcor and in so doing it was conspiring with Mr. Dillon. I can't bring this beyond a speculation. There is no evidence that Dillon knowingly participated in any conspiracy which may have existed.

We have a rather analogous situation to the Harlem River Consumers Co-Op case which was decided in this district this year where in effect a whole group of suppliers were alleged to have conspired and where the participation in the conspiracy rested on nothing more than an ambiguous situation such as this. Judge Pierce granted a motion fora directed verdict.

These are the significant things in trying to help your Honor resolve as to what inference could be drawn.

There is no evidence that Dillon spoke with McNamara concerning Nabcor on any other occasion, or that anything else was said in their one conversation with respect to Nabcor over and above what Dillon has testified. There is no evidence that McNamara asked whether Ruckle was selling cars to Nabcor or knew that Ruckle was selling cars to Nabcor or cared whether Ruckle was selling cars to Nabcor.

There is no evidence that anybody at Pontiac suggested to any Pontiac dealer not to sell to Nabcor.

Of course Nabcor's records show that once it couldn't obtain Pontiacs from Ruckle it started to get them from Bates, which is located in the Bronx. Bates and Ruckle are both in the New York Pontiac zone.

Nabcor's last purchase from Ruckle was on March 17 and between March 17 and June 16 of '67 Nabcor purchased 18 Pontiacs from Bates. That's on Defendants' Exhibit F.

Thereafter, Nabcor's record shows that it obtained between June 16, 1969 and May 1 of 1970 it obtained 80 Pontiacs from Al Wilson in Pennsylvania.

Thereafter --

THE COURT: Could you go over the figures again. How many did they get from Bates?

MR. KLEINBARD: Between March 17, 1967 and June 16, 1967, 18 from Bates.

THE COURT: And then they went --

MR. KLEINBARD: Should be March 20, your

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Honor.

Then they went to Al Wilson.

THE COURT: Al Wilson is in Philadelphia?

MR. KLEINBARD: Near Philadelphia.

THE COURT: And purchased how many?

MR. KLEINBARD: Over a sustained period of time it purchased 80 Pontiacs, from June of '67 until May 1 of 1970.

And then simultaneously from October 14 of '69 to July 17 of '70 Nabcor got 21 Pontiacs from Kline Pontiac. I think that's the Ruckle story. I think the evidence which I have related negates any inference that Dillon was consciously involved in any kind of conspiracy with General Motors.

THE COURT: How many cars from Kline?

MR.KLEINBARD: I believe 21, your Honor.

THE COURT: Where is Kline located?

MR. KLEINBARD: On Defendants' Exhibit J.

THE COURT: What is the location geographically?

MR. KLEINBARD: Doylestown, Pennsylvania.

I am informed that Defendants' Exhibit J, which is from the police books, totals 21 Pontiacs and that from the computer we were able to run 22

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Pontiacs from Kline Pontiac.

THE COURT: I'll need to adjourn now.

MR. KLEINBARD: I think we're practically through with this period of time,your Honor.

THE COURT: I want to bear down on this period late '66 and early '67. There was a great deal of emphasis, as we said, placed on this period in the testimony.

MR. KLEINBARD: The Ruckle episode.

THE COURT: The whole period.

The testimony was that a lot of employees had to be let go in '67.

I want you to consider overnight, Mr. Person that evidence and that argument. I am very much puzzled by these financial statements which I started discussing with you yesterday.

MR. PERSON: I have an answer to that, your Honor.

THE COURT: Let me pose a question. I want you to ansewr this tomorrow: Aside from the problems I mentioned yesterday, I am struck by the fact that according to the fiscal 1967 financial statement, which is LLL -- if I can put my hands on it.

MR. KLEINBARD: Here's a copy, your Honor.

(Pause)

THE COURT: Franchise income is listed as $1500. Training income is listed at $12,000. The automobile sales income is listed -- the Xerox is bad but I think it reads $261,000. Those are the items of income.

Obviously I'm not trying toget at the moment as to whether there was cash or whether there was some accrual, but where was the cash flow in 1966 and where was the income -- whether cash or notes or accruals that would have come from the sale of 50 or 60 franchises in 1966? Where was the cash flow to support any kind ofoperation under this financial statement?

MR. PERSON: Next to the last page, your Honor.

THE COURT: What does that tell me?

MR. PERSON: I was told, and I've only seen this now -- I was told that the franchises were five-year franchises with a refundable feature, so from an accounting standpoint no accrual could occur until the expiration of the liability. Therefore on the next to the last page you will find a $234,000 entry reflecting that, and that's with the purchase of 50 franchises at $5000 each.

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THE COURT: What was the cash flow situation?

MR. PERSON: I believe it was all cash.

THE COURT: Where is that reflected?

MR. PERSON: The next to the last page, franchise deposits, page 3.

THE COURT: This is virtually unreadable. I don't know what you have.

Did the accounting method suddenly change in 1968, fiscal '68?

MR. PERSON: I don't know what changes occurred between '67 and '71.

MR. KLEINBARD: In '68, according to Defendants' Exhibit MMM, there is a comparable situation.

THE COURT: Comparable to what?

MR. KLEINBARD: In the sense that you have funfundable franchise deposits. You at that time also have a considerable decrease in franchise income.

MR. PERSON: A change of method of selling overlapping the old method.

MR. KLEINBARD: I think that does explain it.

THE COURT: One or two things occur. According to the listing, the biggest number of franchises taken on, the listing in X5, or whatever, the biggest number was taken on in 1966. I forgot whether it was 50 or 40 or what.

MR. PERSON: Slightly more than 50.

THE COURT: Just starting with that and before you get down to any refinements at all, one would at least raise the question as to whether there would not be a substantial amount of income, and I'm speaking now of caseh income, in the year 1966 from those franchise sales.

I know that there are lots of problems with that proposition, namely, the possibility of taking notes, the possibility of some other non-cash arrangements, but if you are telling me that most of it was received in cash and that recorded a low sales figure simply because of a contingent liability feature, then, all right, it was received in cash.

That leads me to question -- I have got to question -- whether there is anything to go to a jury about the alleged damages claimed. If your claim is that this sort of put the fatal curse on the activities of late '66 and early '67, put the fatal whatever-you-are-going-to-call-it to Nabcor's business, you can't sort of say that and talk about firing people.

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Unquestionably the most profitable phase of Nabcor's business and the only business they really ever made any profit on was the sale of franchises, because the gross profit on automobile sales was really very close to nothing. It was not enough to support any kind of overhead at all.

Those gross profit margins on automobile sales to Nabcor are virtually nothing. So the only way Nabcor could ever live, unless their sales of automobiles just increased astronomically, seems to me would be the franchise sales, and the biggest year was '68.

So how can you tell me they have to reduce operations? The biggest year was '66. They should have had the biggest cash flow in that year unless they took a bunch of notes, and they should have had the biggest and best start for '67 of any year, if there was that cash flow which you have said.

I do not understand why anything that has been told me in this case could possibly be responsible for the laying off of employees in early '67 and a reduction of operations.

This is the kind of thing that has to be analyzed. You just can't say "I had a lot of problems.

I had some problems getting cars. It led me to financial problems and some dealers were cancelling out and therefore I had to lay off a lot of people."

This financial picture has to be analyzed very, very closely if you are ever going to talk about damages.

You think about that overnight and I will see you at 10 o'clock.

(Adjourned at 4:40 p.m.)

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NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,
vs.
GENERAL MOTORS CORPORATION,
et al.,
Defendants.

70 Civ 5 421A

New York, December 1, 1976;
10.00 A.M.

Trial Resumed.

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(Jury not present.)

THE COURT: Mr. Watson, why don't you note your appearance and say who you are representing on these motions.

MR. WATSON: Yes. If the Court please, my name is Joseph Watson and I am a member of the firm of attorneys of record for the defendants Gillogly Chevrolet and United Frontier Dealers Association, and I appear this morning in addition to those defendants for Paul Batt Buick, Bain Chevrolet and Glen Campbell Chevrolet for the purpose of these motions.

THE COURT: Thank you.

Before we start in again, I mentioned at the end of the day these financial statements.

Some of them are really legible and I wish

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that the lawyers could get together and mark this up in ink. You probably know what these entries are, but there are entries on the balance sheet that I cannot read at all.

MR. KLEINBARD: We have the same problem.

THE COURT: Where is a readable copy?

MR. KLEINBARD: The lefthand side is almost illegible.

MR. PERSON: I have to go back into the documents that were produced to locate that.

THE COURT: I think this is an important piece of evidence. Can I see MMM?

MR. KLEINBARD: Yes, your Honor, I have a copy.

THE COURT: Is that in evidence?

MR. KLEINBARD: Let me make certain it is in evidence in this proceeding, your Honor.

Yes, your Honor.

THE COURT: I think that will help decipher LLL.

Mr. Person called my attention in LLL yesterday to an entry in the liability statement of $234,200 in LLL. The heading or the caption for that item I couldn't read, but there is a similar item in

MMM which is completely readable and it is $346,551 and the caption is "Refundable Franchise Deposits."

I would assume that that same caption belongs on the similar item in LLL. Is that correct?

If you can stipulate to that, that is the one I was paying attention to. How about that, Mr. Person?

MR. PERSON: I say that is correct. It should be other liabilities on top of that.

THE COURT: Let's have the original exhibit. Can we have LLL?

MR. KLEINBARD: We have found a more legible copy, if you would like to work from that, just those pages that you are talking about. I guess we had that retyped.

THE COURT: This looks fine. Why don't you get this exhibit straightened out and get the original in legible form. I think you certainly could use the pages you have just given me.

I don't understand that idea of refundable.

MR. PERSON: The agreement provided that the full amount of the franchise could be refundable out of sales of automobiles at the rate of $25 per car over a five-year period.

THE COURT: Mr. Maiorana described the compensation arrangements. Before the master broker thing came in the idea was, from Mr. Maiorana's testimony, that the general brokerage fee would be $200. Then they later added a $25 registration fee. The broker kept $100, Nabcor received the rest, which would mean that Nabcor would get either $100 or $125, depending on what was charged, and the broker would get $100.

What I am not clear on was there a refundable provision in addition to that?

MR. PERSON: Yes, your Honor. There was provision for full repayment of the franchise out of -- based on sales.

THE COURT: Full repayment?

MR. PERSON: Of the franchise fee.

THE COURT: Of $25 a car?

MR. PERSON: That is my understanding, that is correct, your Honor.

THE COURT: Were these refunds paid?

MR. PERSON: This would be the entry, I believe, in LLL, franchise income would be $1500.

THE COURT: To whom?

MR. PERSON: To Nabcor. In other words,

the sale of the car allowed a release of the refundable deposit to the extent of $25 a car.

THE COURT: In other words, when the broker got compensated on an individual transaction, what would he do?

MR. PERSON: He would get a refund of $25.

THE COURT: How did it work mechanically?

MR. PERSON: Probably in the price of the car, the entry indicated the broker received a reduced price for the automobile. This was a bookkeeping entry to adjust the franchise cost.

THE COURT: Let us take an example. If the car cost Nabcor $3000 and the broker sold it for 3200 --

MR. PERSON: For $3,2225.

THE COURT: The $25 was a registration fee, right?

MR. PERSON: This came in later, though.

THE COURT: Let's skip that, and that doesn't affect my present --

MR. PERSON: He would get it for 3100 minus a quarter.

THE COURT: What do you mean?

MR. PERSON: Minus the 25. He would get the reduced price.

THE COURT: Then he would charge his customer 3200.

MR. PERSON: But it was essentially 3200.

THE COURT: Let us say it was 3200 as a for instance. Let me see if I can understand this.

Nabcor would pay $200 to the dealer, assume that. And then I want to go to the customer's end of the thing. The customer would pay 3200.

MR. PERSON: Correct.

THE COURT: So there would be a total profit of $200. Now, you are saying that the broker would get $125 of that?

MR. PERSON: $100 plus the $25 refund on the fee.

THE COURT: The $100 would be considered by your people as his brokerage fee or his profit or whatever you call it.

MR. PERSON: We would give him 100 and an additional 25 as a refund of the original, partial refund of the $5000 franchise fee.

THE COURT: So Nabcor then would get $75.

MR. PERSON: They would get $75 plus a payment of $25 from the reserve set up for the franchise deposit and that $25 then accumulated in an entry franchise income for the fiscal 1067. These $25s accumulated and became franchise income in that year in the amount of $1500.

THE COURT: But you paid the $2! to the broker.

MR. PERSON: No, they also took $25 out of the reserve, and it is a bookkeeping entry.

THE COURT: But bookkeeping entries have reasons. Either somebody is worried about their income taxes or something. I don't understand this at the moment. It has a relation to the cash flow.

MR. PERSON: It was a refundable franchise fee of $5000. That is the basic reason for it, to insure that the amounts that were prospectively due to the franchisee were reserved on the books, to indicate that it was a liability to the franchisee.

THE COURT: Why did they have it refundable?

MR. PERSON: To make it a more attractive offering.

THE COURT: Why not reduce it?

MR. PERSON: It was reduced subsequently down to a one-year period, but it was reduced from five down to a one-year franchise. It was a five-year franchise at the beginning.

THE COURT: I guess the idea was to get the cash in, Nabcor wanted the cash flow, right?

MR. PERSON: There is no testimony as to that, but I assume a business tries to --

THE COURT: Of course, there is nothing wrong with that, but they wanted the cash. You are selling franchises and if somebody is willing to pay $5000, okay.

Then the idea, another basic idea is that the franchisee over a period of time out of the business gets his money back plus presumably a profit. He has a refund of the $5000 in $25 installments, and he would make money consisting of an additional $100 or whatever it is.

MR. PERSON: And the $25 non-recurrent. It was terminable at the point of full repayment. The basic business was the $100.

THE COURT: I understand. In other words, if he sold a lot of cars fast he would get his 5000 back fast?

MR. PERSON: I assume it was refundable at any point. If a man came in with an order for 200 cars he would have a rull refund at that point.

THE COURT: You would not keep on giving him that $2500 over five years?

MR. PERSON: Non-recurrent and terminable at the point of the recovery of the $5000.

THE COURT: That meant --

MR. PERSON: '67 cars.

THE COURT: That meant that the broker was lending money to Nabco.?

MR. PERSON: The effect was not a loan. It was never created as a loan but it was an opportunity to earn based on performance the full amount of his franchise fee; but it was nct cast as a loan. It became an obligation in a sense on Nabcor's part in terms -- I don't think there was a loan involved here. I don't look at it as a trust or a loan, but I guess the document would speak for itself. It was on the books as an amount that had to be repaid for the franchisee in the event there were sales. There was a continuing obligation of some sort.

THE COURT: It was not a contingent obligation, was it?

MR. PERSON: Based on performance, yes.

THE COURT: If the franchisee didn't sell anything then Nabcor kept the whole 5000?

MR. PERSON: That's correct.

THE COURT: So the franchisee had to earn it back?

MR. PERSON: Yes.

THE COURT: In that sense it was contingent?

MR. PERSON: Correct.

THE COURT: I want to go back. Let's take our $3000 example.

A broker has paid in $5000 cash. Let's assume that. Then he makes his first car sale and that's the $3000 example we talked about. Nabcor has received $5000 in cash and it's sitting in the bank. Nothing has happened to it. It's just there. The man immediately makes his first car sale, and he sells a car, agrees to sell a car, for $3200 to a customer of his and he orders the car from Nabcor and Nabcor gets it for $3000. Let's eliminate the $25 registration fee.

MR. PERSON: That came later.

THE COURT: Let's not talk about that $25. That was intended to cover some costs, right?

MR. PERSON: That was the rationale. It was also an element of profit.

THE COURT: Let's assume we have not come to that point in the business yet. So it's just a $3200 sale for a car that Nabcor gets for 3000. Now, Nabcor gets the car, pays $3000 to the dealer, delivers the car, and the car is delivered to the customer. The customer pays $3200.

What happens to the $3200?

MR. PERSON: The 3200 is allocated -- the $200 is allocated in the following way --

THE COURT: 3000 goes to the dealer?

MR. PERSON: Yes. Thyre is 200 to deal with and immediately the broker keeps 125 and remits 75 through the exchanges. When everything is ironed out the broker keeps 125, Nabcor keeps 75 but reflects franchise income of $25.

THE COURT: I want to get that clear.

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Before we started this transaction Nabcor -- let's take it at the moment when Nabcor had sold the franchise and received the $5000 in cash. We are back now in mid-1966, and they're not going public or anything. It's their original setup on the books.

How would Nabcor treat the 500 on its books?

MR. PERSON: It would be an addition to cash or note or account receivable.

THE COURT: Let's say it's cash.

MR. PERSON: It's a credit to cash and there is a balancing entry to other liability, namely refundable franchise.

THE COURT: How is it reflected? Is there any record on its income statement?

MR. PERSON: On its income statement I believe it would have been reflected only in the event of sales.

THE COURT: If you are going to have a credit to the cash column --

MR. PERSON: It's a liability.

THE COURT: You would not have anything in sales at that point?

MR. PERSON: No. It's a refundable

feature.

THE COURT: You have gotten in cash and you have reflected a corresponding liability.

MR. PERSON: Although it's a contingent liability. It's not a true liability.

THE COURT: The nature of it we understand.

You have included it in the financial statement LLL or MMM as a liability, a contingent liability, which is generally footnoted and only included as a liability to the extent of a reserve. So this was not in fact treated on the financial statements as a contingent liability, but, anyway, at least I'll accept this explanation.

Now we come to the point of the car sale. What happens on Nabcor's books?

MR. PERSON: Let me go back and say I have construed this to be a contingent liability.

THE COURT: It was not reflected as such on the books?

MR. PERSON: It says refundable franchise deposit on the accounting sheets. That's what the accounting sheets say and it does say it's another liability.

THECOURT: It had the effect of preventing an entry on the income statement, and that's a very important effect. For instance, when one is worrying about income taxes, that's important. I have not seen the tax returns but, anyway, whether 243,000 is included in income or not may have some effect.

MR. PERSON: These matters have never been an issue in the case.

THE COURT: But this is not without meaning. I want to find out what is the effect at the time of the car sale.

MR. PERSON: The car sale is an easy effect. We are dealing with $2500. The broker would keep $100. Nabcor would keep $100 and Nabcor would send a check -- this is all theoretical -- to the broker for $25, and Nabcor would take $25 from the other liability --

THE COURT: I have got to go even slower than that.

The broker would record on its books $100 in income.

MR. PERSON: And $25 in partial refund. So he has a reduced cost of his franchise down to $4975.

THE COURT: The other --

MR. PERSON: Nabcor balances that amount as a liability. The remaining balance of 4000 --

THE COURT: You are going too fast for me. I cannot follow you.

Maybe the best way to approach it is this: Nabcor had in its financial statements an entry automobile sales.

MR. PERSON: That would be plus the cost of the car. There would be the gross price of 3100, but the 100 would be reflected below that in gross profits.

THE COURT: That's what I want to know. I want to know what, in this transaction we have spoken of, is included in Nabcor's automobile sales. Is it the 3100 or the 3200?

MR. PERSON: $3100.

THE COURT: I would think so.

MR. PERSON: They received 3075 but call it 3100.

THE COURT: All right.

So 3100 is in auto sales. What is put in for cost of automobiles? 3000?

MR. PERSON: Yes. And below the line we have gross profit --

THE COURT: Don't get below the line. Nabcor records 31 as auto sales and 3000 as cost of sales. Pause there for a minute.

Nabcor has gotten an additional $25. How is that recorded?

MR. PERSON: They have really lost the $25. They're overstating income by $25.

THE COURT: So how do they account for that, the difference between the 100 and the 75?

MR. PERSON: They recognize the 100 as gross profit on automobile sales, but that is an overstatement; but they only got $75 so they now have a $25 amount that they deduct from the liability.

THE COURT: Right.

MR. PERSON: That offsets that amount. In other words, Nabcor at this point has $25 of franchise income.

THE COURT: What has happened, on the balance sheet they reflect $75 in cash on the asset side. They reduce their liability by $25.

MR. PERSON: But they have cash for that still somewhere.

THE COURT: Wait a minute. Follow me.

They have received from the broker $75 in cash, whatever way you want to call it. So they are better off at that moment by $75 in cash. $75 in cash is running up on the asset side, right?

MR. PERSON: Yes.

THE COURT: That's step one.

Step two, there is a reduction by $25 on this liability entry, right?

MR. PERSON: Yes.

THE COURT: So that's "a net gain," if you want to use the term loosely, to Nabcor of $100.

MR. PERSON: They received $100 and paid out $25, and they have $25 less in liability.

THE COURT: You are saying exactly what I'm saying only it's in a way I can't follow.

I want to go back.

They have physically received $75 in cash.

MR. PERSON: If we can eliminate the $25 for the moment --

THE COURT: I don't want to do that. I want to take it one step at a time. They have received in their hands $75 in cash. Naturally you ring that up on the cash side, the asset side.

MR. PERSON: Correct.

THE COURT: They have eliminated a liability to the extent of $25, so they have reduced a liability, that $234,000 is reduced by $25.

MR. PERSON: That's right.

THE COURT: The net of all of that is that their net worth, so to speak, is increased by $100.

MR. PERSON: I think it's $125.

THE COURT: Is it?

MR. PERSON: There is a $25 amount --

THE COURT: You may be right.

MR. PERSON: That's why we have franchise income of $25. I can't figure out the remaining entry. I'm trying to figure where there is an offsetting entry of $25 in addition.

THE COURT: You are saying they're able to record $100 in auto sale and $25 in franchise income?

MR. PERSON: They have $100 in auto sales and the 25 in franchise income becomes earned reducing the liability to 4975.

THE COURT: I don't concede that.

MR. PERSON: The other $25 they got a long time. They're only recognizing it at this point so it becomes a reduction in the amount of income they could recognize in that account subsequently.

THE COURT: You may be right. I don't at the moment grasp that.

MR. PERSON: It gives them the $25 firm.

THE COURT: What you are saying is that these are the entries that occur upon the sale. I may not fully understand it but you are saying these are the entries: $75 added to cash and $25 taken away from liabilities, and $100 in auto sales on the income statement, and $25 --

MR. PERSON: Gross profit on auto sales.

THE COURT: It's actually $3100 in auto sales and 3000 in gross profit or -- this is what I don't grasp, but I won't pause endlessly on this.

You are saying there is a $25 entry to franchise income?

MR. PERSON: Only because it was never earned before.

THE COURT: This is the first moment of earning.

MR. PERSON: That's correct.

THE COURT: According to my present reasoning processes, that would explain a low franchise income in Exhibit LLL, speaking in a general way without trying to actually tally everything up?

MR. PERSON: That's my total understanding of that.

THE COURT: But we come to MMM and we come to the offering circular and it seems to me that there must have been some change.

MR. PERSON: A change in the method of selling franchises. They were taking a one-year period and recognizing that as income at this point but not the prior year. The prior year was still in the reserve.

THE COURT: What did they do beginning January 31, 1967 that accounted for a radically different treatment in '68 financial statements.

MR. PERSON: I see 158,000 in notes receivable and accounts receivable as an asset. That means that they must have sold a lot of franchises on a postponed payment basis. They still have a tremendous other liability which would very well be a combination of these two amounts, the amount in assets that we have just seen plus the continuation of the old accounting method, so -e add those together and you would have -- you still have a liability for refund for that one-year period for the amounts reflected in notes receivable and accounts receivable.

THE COURT: Why are you saying in the -- they took in $25,000 in franchise income. Is that a bunch of these $25 items?

MR. PERSON: That would be the current year under the new method.

THE COURT: What is that? Let's take the new method. Let's take a $5000 franchise purchase. What isthe new method? What is entered on the books?

Suppose it's cash. 5000 is added to the cash side. What is done on liabilities and income?

MR.PERSON: I cannot say if a franchisee went under or dropped out whether or not they might have recognized income at that point. I can't explain looking at these why there would be franchise income except to say that maybe some obligations had terminated by this time by the inactivity of the broker.

Otherwise I would think there would still -- the first year never came due under the terms of the five-year arrangement. Maybe a 1/5 of it became due. Maybe that was the method.

THE COURT: I could see this. In other words, under your theory, if a franchise terminated --

MR. PERSON: Or 1/5 became due as aresult of the passage of one year, with franchisees a certain amount, maybe,had been accrued by the inability of the broker to earn it back during that one-year period.

THE COURT: You mean he was obligated to pay this?

MR. PERSON: He was allowed to earn it back over the five-year period.

THE COURT: What if he didn't?

MR. PERSON: Then he would not receive it back.

THE COURT: Where does it say that? In other words, he had to earn it back so much per year or else he lost it?

MR. PERSON: That's what I could say justifies the receipt of income --

THE COURT: Is this the fact? You have read the agreements ?

MR. PERSON: I would have to look at the books and consult the accountant on that.

THE COURT: I want to try to find that offering circular. What is the exhibit number?

MR. KLEINBARD: F6.

MR. PERSON: Beginning at page 8.

THE COURT: In the balance sheet as of January 31, 1971, which is the only balance sheet in

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the offering circular, there is not any liability item of this type, I don't believe. So the method must have been completely changed, was it?

(Continued on next page)

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MR. PERSON: A different accountant did come in and change the accounting method, yes, your Honor.

THE COURT: Did he do it retroactively?

MR. PERSON: He used the accounting records from the other accounting firm that were here and there is no 1966 fiscal, ending January 31, 1967, but I notice there is taken into account on page 24: "Extraordinary Items: Gain on Expiration of Franchise Deposit Obligations Net of Pennsylvania Corporate and Federal Income Taxes," $126,127, page 24.

THE COURT: I wouldn't get involved in all this morass if I didn't think it was important; it is important. It is important to determine what the evidence shows about the effects of the alleged wrongdoing at different points on Nabcor's business.

We have had testimony that there was an effect on Nabcor's business and you have argued certain things about an effect. But the facts about the Nabcor business, a lot of them should be reflected in the financial statements. That is where wenormally turn and I started out in this exercise a few days ago thinking that I could turn to the financial statements and I could get an idea from them as to the volume of business done in auto sales and franchise sales for the different years.

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I had that notion, I think that would come to anybody, that you could take the offering circular as reflecting the volume of different types of business for the years reflected there. You have four years' income statements, fiscal 1968, 1969, 1970 and 1971.

Then I could look at the Exhibit LLL, which was a financial statement for one year of operation we are involved with that isn't in the offering circular, that is fiscal 1967.

I find that instead of being able to do that I had just a morass of difficulty because of these different accounting methods. I just give up this quest at this point, but I think it is unfortunate that the records, on the subject of what was going on in Nabcor's business, I don't have financial statements that I can use.

If this case gets to the jury I would think it would be difficult for them for the same reason, but let's pass it.

MR. KLEINBARD: Your Honor, may I just make one or two comments so we don't have to come back to this, because it does affect aspects of my presentation.

No matter how you look at it, even going on the present financials, the current assets --

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THE COURT: Which financial?

MR. KLEINBARD: The one before you, LLL and MMM, and forgetting for the moment about the refundable deposit which I will mention later, you have total current assets as of the end of fiscal 1967 of almost $114,000 and current liabilities of 13,607, or a net working capital of $100,000 odd dollars.

THE COURT: Wait a minute, where are you looking?

MR. KLEINBARD: LLL. If you look on the asset side, which I only have part of, the assets sheet, you will see total current assets of $113,946.15.

THE COURT: Right.

MR. KLEINBARD: If you go to the second page, you will see current liabilities of $13,607.

So that if you subtract one from the other there would have been a net working capital, independent of the refundable franchise deposits of $100,000.

MR. PERSON: Made up of the obligations from franchisees which were ruined by the activities of General Motors.

MR. KLEINBARD: I don't know what they are made up of, your Honor, because there is no substantiation of what these were made up of.

THE COURT: Mr. Person, I am completely plagued with generalities. Now, let's have the list of the notes receivable and let's see if those were brokers that were knocked out at this time by some wrongdoing of General Motors.

Have you got that evidence?

MR. PERSON: It is not in evidence.

THE COURT: Unless you have that, you haven't got any evidence to support that statement. $37,000 in notes receivable is a far cry from a total of $234,000.

I think one thing I deduce from this statement is that it shows, talking about LLL, it shows franchise sales in terms of selling these $5000 franchises for either cash or notes, subject to this refundable obligation, of $234,000.

Now, out of that about 37 or 38 thousand is listed as notes.

MR.KLEINBARD: I believe that is 87, your Honor. On my copy it is 87.

THE COURT: All right, I will make it 87.

I better get from you that clear copy if you can get it Xeroxed and give me that new MMM some time today

MR. KLEINBARD: Yes, your Honor.

THE COURT: In any event, I don't think there is any evidence, but if you just subtract 87 from 234 you get about 140 some thousand dollars, I believe.

For me to consider that those $87,545 worth of notes were all rendered valueless by the alleged activities of General Motors at the end of 1966 and early 1967, would, I think, involve a lot of gymnastics because they are somewhere between 30 and 40 per cent of total franchise sales.

We don't know on the record presently before us what dealers they refer to and so forth and so on. So to say that the working capital was knocked out by General Motors would take proof.

MR. KLEINBARD: Beyond that, I didn't quite finish, you have the working capital that should be taken, that I have just by looking at these and not speculating for fiscal 1967, $100,000, at which time there was cash of $16,995, let's make that $17,000, and notes of $87,000, which we have just referred to.

If you compare that with 1968, which is after the so-called chaotic period, the total current assets are 220 and the total current liabilities are 9565, so that your working capital would be considerably increased from $100 to $210 thousand.

And on the question of notes, the notes only go from $87,000 in fiscal 1967 to $112,000 in fiscal 1968.

THE COURT: Let me make a note.

2 **MR. KLEINBARD:** Similarly, your Honor, the cash which in fiscal 1967 was roughly $17,000, in fiscal 1968 goes up to almost $35,000, so there is no conceivable basis that you can read 1968 was a less healthy balance sheet than 1967. If anything, it shows considerable improvement.

One final thing about the two statements. It appears to me at least, and I am not an accountant, that they changed the method of accounting in fiscal 1968 and took into income the franchise sales, which would account for $120,000 because if you add $120,000 to the refundable franchise deposits which appear in LLL, you get practically the figure that appears as a liability here, $346,551. The closeness of those figures suggests that was one reason for taking it into income and also putting it below the line at that point.

THE COURT: The two figures you are adding

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are what?

MR. KLEINBARD: At the end of 1967, taking it at face value, we had refundable franchise deposits of $234,000. If you add $120,000 to that, you get 356, and when you go to the 1968 statement and look for the refundable franchise deposits, it is 346, which is a very close correlation, especially with all these other things that Mr. Person mentioned, and also if you have other income of $120,000.

At least it would appear to me that, No. 1, it was taken into income and, No. 2, it was left as a contingent liability or whatever you want to call it.

The third thing I want to mention was a kind of --

THE COURT: If you did that your national cash register would jam.

MR. KLEINBARD: It certainly is a very odd combination or coincidence and the other thing is this: It is a heads I win, tails you lose proposition, because clearly this 200-odd thousand, whether it was regarded as refundable or not, really was cash available to Nabcor, because one of two things would happen and indeed did happen in 1971.

Either the franchisees stopped doing business, dropped by the wayside, as we had testimony some of them did, in which case Nabcor would never have to refund those deposits;

Or the business would be so successful that there was money pouring into Nabcor and into the franchisees, so they would earn their franchise back, so that this money was really available to Nabcor at all times.

There may have been an accounting entry, but there is money there to finance an operation, and it goes to the question of whether, for example, you had to let employees go and change your method of operations, and in this connection I might point out that these franchise salesmen were on commission, not salary.

So that if there was anything directed against Nabcor in any particular period, there was no reason to discontinue franchise salesmen because of any financial situation. Assuming a poor financial situation, and I think the facts show the contrary --

MR. PERSON: Where is the cash? Talking about a quarter-million in sales and where is the cash?

MR. KLEINBARD: I think what you have is a refundable deposit is money.

MR. PERSON: There is no cash. Read the statements again.

THE COURT: Look, Mr. Person, is they were making sales of franchises --

MR. PERSON: A liability isn't cash, your Honor. He is saying a liability is cash when it is not.

THE COURT: I don't like to rethread what we said before, but we went through this patiently and I do not want to go into it again.

But in fiscal 1967 you have a liability, refundable franchise deposits of $234,800 and you described to me what would happen upon the sale of a franchise.

Either cash was taken in or notes were taken in or something would be taken in that was refundable and if they don't bother to take anything in and put it on the liability side, that is their fault, not General Motors.

There must have been something to be refundable and it must have been, unless you just had something that I can't even dream about, there must have been either cash or notes taken in.

MR. PERSON: Page 3 points to the fiscal condition of the company. We overlooked a little point in parentheses, the $124,000 in parentheses, the amount that Mr. Kleinbard is saying that we should have spent.

THE COURT: Because you have recorded your cash as a liability basically.

MR. PERSON: Take a look at the cash, the cash is recorded as cash and --

THE COURT: Look, I want to ask you, this is where we started out, and if I am wrong you correct me because I want to know the story.

MR. PERSON: I will try.

THE COURT: Can you tell me the amount in dollars of franchise sales in fiscal 1967? I will define franchise sales for you and it may not be the way that they had them on their income statement this time, but I want to define it so we are clear.

A franchise sale is the kind of thing you and I were talking about in our hypothetical $5000 example. You listen to me.

MR. PERSON: I am listening.

THE COURT: Where the franchisee buys a franchise for the $5000 amount, which I understood was an amount he was supposed to pay in fiscal 1967. Is my hypothetical realistic?

MR. PERSON: But you haven't said --

THE COURT: Does he either pay cash or

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notes?

MR. PERSON: If he does -- let's assume that he does, yes.

(Continued on next page.)

THE COURT: Were they selling them on some other basis?

MR. PERSON: Not that I know of.

THE COURT: Then they took cash --

MR. PERSON: Either notes receivables or cash.

THE COURT: I want to know from you the amount of cash, total cash, and notes received in fiscal '66.

MR. PERSON: 234,000.

THE COURT: How much of it was cash and how much of it was notes?

MR. PERSON: I can see expenditures of $146 on page 4. That was presumably in cash. I can see cash remaining in the amount of 16, I believe, and I see notes receivable in the amount of --

THE COURT: That's a help. In other words, you would suggest adding the 146 cash expended to the 17 cash on hand. That would give you 163, and if we added 87 to that.

MR. PERSON: It should be pretty close.

THE COURT: It would be 250, but that is certainly in the ballpark. Somebody may have invested some money too. I don't know.

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You are suggesting you could draw an inference that about 163, or something in that area, was received in cash from the sales?

MR. PERSON: The difference between the amount that was reflected as a sale and the amount that we know was in cash, yes.

THE COURT: I'm taking the figures you told me to add: 146, 17, and that's 163. You suggested adding the notes to that and --

MR. PERSON: We had about 30 in cash that went into the company originally. So I think we have to deduct that amount.

THE COURT: Where is that reflected?

MR. PERSON: 27, I'm sorry.

THE COURT: We are not trying to get it down to the last dollar.

There was some cash put in at the beginning?

MR. PERSON: Correct.

THE COURT: It seems to me that speaking in very rough terms you probably had about, according to these calculations, 150 in cash from franchisees and you got about 80-odd in notes.

Go back to your presentation, Mr. Kleinbard.

MR. KLEINBARD: I was up, your Honor, to,

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I believe, Paragon, and I just want to touch that briefly.

In the first place, the most important thing as far as General Motors is concerned is that Plaintiffs' Exhibit 699, which contains the alleged complete list of refusals, it contains nothing about Paragon Oldsmobile.

In addition to that, once again, the pejorative statements of the dealer are in no way linked to General Motors.

THE COURT: When did they occur?

MR. KLEINBARD: Late '66 or early '67, your Honor. I think the bottom line is that they're not complaining, as far as we are concerned, about Paragon Olds, as far as cars are concerned.

MR. PERSON: May I make a statement? 699, there was no attempt to accumulate every time a dealer refused to deal with us. We are talking about cancellations in this case, specific cancellations, that were within the time period.

THE COURT: Let's find out what the claim is against Paragon and let's see what the testimony was.

As I recall, there was a letter of May 13,

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1966, in which Paragon said they would sell cars.

Frank Maiorana testified that orders were submitted to Paragon May, 1966, and thereafter, just a few, and he didn't recall the amount but that we can check.

Then he said there were orders which were not delivered, and he spoke to O'Brien and Goldsmith.

O'Brien said he didn't have a fleet certificate. O'Brien said the zone was "shutting you off," couldn't sell cars.

Goldsmith is supposed to have said: Couldn't sell cars, zone wouldn't allow it. No fleet certificate.

That was December of 1966.

It seems to me that that was not a situation where it was one of those initial turndowns of a commitment as in Buffalo. This was, according to Frank Maiorana's testimony, a complaint about specific non-deliveries. So it should be reflected in 699./

I want to take a recess.

You check up on this.

(Recess)

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MR. KLEINBARD: We were on Paragon. I want to make four comments --

THE COURT: Is that an Oldsmobile company?

MR. KLEINBARD: That is correct. One is that Plaintiffs' Exhibit 699 contains no complaint about Paragon and that Plaintiffs' Exhibit 450 contains no orders and no cancellations, so that, finally, whatever perjurative remarks were made either by Mr. O'Brien or I think Goldsmith, would obviously not be binding on us, and I believe your Honor so instructed two or three times during this particular testimony. I don't see any need to dwell on it.

THE COURT: I am going to have to break in about seven or eight minutes and we will take an early lunch, I have to attend a meeting. I hope that is all right with everybody.

MR. KLEINBARD: I think I can finish a group of dealers.

THE COURT: You make a note, Mr. Person, for your response. You tell me what your claim is about Paragon.

MR. PERSON: Would you like it now?

THE COURT: No, I think you better wait, but make a note.

MR. KLEINBARD: Now, we come at this point to dealers who allegedly ceased or refused to deal with Nabcor after this so-called crisis period, late 1966, early 2967.

First, the general observation which really I believe is dispositive of all this: that is, that we are now entering the period of time when, as I mentioned earlier, Nabcor got every car it ordered except the Askew Corvette. So that is totally inconsistent with these sporadic and occasional and isolated incidents.

THE COURT: Before we get into that -- we don't have much time before lunnch -- but I want to discuss further this late 1966, early 1967 situation. I want to get a better idea of this car sale situation.

This involves, of course, Colonial Cadillac, which I think I put to one side, but I better come back to that, and then I better look at some of this analysis of the car sales.

For instance, I am looking at Exhibit E-9 dealing with Chevrolets. In 1966 you have five Chevrolets recorded as ordered in Exhibit 450.

You have a minimum of seven received, a maximum of nine received, so that doesn't look too bad, obviously.

MR. KLEINBARD: Does that include the Luby ones, your Honor -- I am sorry.

THE COURT: In 1967 you have 55 orders recorded and 12 cancellations listed. Four listed as delivered with definite serial numbers and 26 deliveries where you don't know the serial numbers.

MR. KAPLAN: You have to correct that line. We have gone over it last night, and the original number 8 is right. The next to last column, 37 should be 33.

THE COURT: What does that do to the others?

MR. KAPLAN: The last two columns are 41 and 67.

THE COURT: I guess that involves some further correction.

MR. KAPLAN: We have all these corrections together and can do them at one time.

THE COURT: I already have this much corrected copy of S-8. I wish you would just arrange for that.

I think we will arrange for our lunch break now, and before we go, I just want to make a scanning of the whole picture. I want the complete picture and I want to go into Colonial Cadillac and complete the picture in some way about the auto transactions in late

1966, early 1967, the whole range of them, and see what the conditions are and how they fit into the overall picture if we can go back into that after lunch.

Now, I will let you go until 1.30.

(Luncheon recess to 1.30 P.M.)

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AFTERNOON SESSION

1.30 P.M.

THE COURT: I am going to have the jury called to appear at 2 o'clock tomorrow. I don't think we will be finished before then.

MR. KLEINBARD: Your Honor, in the light of the fact that we have people representing dealers, I am going to try to see if we can move a little more rapidly through this presentation, and during the luncheon recess I prepared a little summary of the late 1966, early 1967, situation. I think that might answer some of your questions.

Doing it division by division, Mid-Town and Luby, I think, have been thoroughly discussed, and there is no need to repeat that.

A.C. Chevrolet had, I think - there was a brief reference to it yesterday, some problems with a demonstrator in June of 1[illegible]6.

There were two cancellations, one in July and one in June.

THE COURT: We are talking about 1966?

MR. KLEINBARD: If it is 1966 -- no, this would be 1967. What I am doing is, I am analyzing the plaintiffs' claims in 699, your Honor. In other words, I think we have to take them to be at their face value.

THE COURT: I don't like to go so slowly, but there is no alternative from my standpoint in getting this thing crystallized to the extent I think I have to.

The two A.C. Chevrolets, are they referred to in 699? I think we covered this yesterday, but as far as A.C. Chevrolet, Mr. Person, you have these listed, two cars, Order No. 304 and the 323.

I don't understand what any claim is as far as pinning these problems to General Motors.

MR. KLEINBARD: There is no testimony to that effect, your Honor.

THE COURT: I don't think there is a bit of testimony. I don't have any note of any testimony by Frank Maiorana or anybody else that A.C. Chevrolet did anything of a guilty nature in the way of any anti-trust conspiracy.

There has been testimony by Mr. Turco that they were palming off demonstrators, and I think we talked about that yesterday.

But I want to ask you again, have you anything besides the fact that they were palming off demonstrators?

MR. PERSON: I believe that the testimony is that they refused to deal with us in connection with Mr. Belcher --

THE COURT: Look, Mr. Person, Mr. Maiorana said a lot of things that he told to Mr. Belcher, and he said he mentioned A.C. Chevrolet. But that is not a substitute or the equivalent of saying something about A.C. Chevrolet refusing or failing to get cars from A.C. Chevrolet.

I don't think Frank Maiorana mentioned it, except in saying he mentioned something to Mr. Belcher and didn't say what he mentioned to Mr. Belcher.

I am going to just put A.C. Chevrolet completely to one side, and unless you remind me of something tomorrow, to me it is extraneous at the moment.

2 MR. KLEINBARD: On the Askew Corvette, which is part of the Chevrolet Division, we already had an elaborate discussion on it.

THE COURT: That is in 1969.

MR. KLEINBARD: You are right, your Honor.

On Pontiac, we discussed Ruckel yesterday. Of the nine cancelled Ruckel orders eight went to Bates.

THE COURT: I know you are trying to make a survey and I appreciate that. I think I have the picture on Ruckel.

MR. KLEINBARD: Eight to Bates. On Bates there were five cancellations in May which is at the end of that period sort of.

THE COURT: Let's pause on this one just a minute.

I don't recall any plaintiffs' witnesses testifying about Bates.

MR. KLEINBARD: That is true.

THE COURT: Unless Mr. Person calls my attention to it, I will assume that is correct.

MR. PERSON: I will respond.

THE COURT: Again, you are welcome to have the record tonight, because I just don't have any note of any testimony about Bates.

MR. KAPLAN: There is one reference, page 453, Mr. Maiorana in the course of describing what he said to Mr. Belcher, and I will read it as it is just one line, "I told him about Grand -- not Grand, but Bates Pontiac," and then went on to something else.

MR. KLEINBARD: That falls in the same category.

THE COURT: That is obviously not enough.

I would like to get out the sheets and see what is alleged in these statements of Mr. Person.

Where is Bates located?

MR. PERSON: In the Bronx, your Honor. It was Grand Concourse, which might account for the confusion.

THE COURT: I have this situation where there are five of these sheets in 699 which refer to Bates, but I don't know. I have no testimony from any plaintiffs' witnesses about the Bates situation and I don't know what to make of any of plaintiffs' claims about Bates. I think I am going to turn to you, Mr. Person, because I don't know what the issue is.

MR. PERSON: This was just a refusal.

THE COURT: Maybe there is something in the documents showing a conspiracy.

MR. PERSON: This was a refusal to deal, to deliver these cars.

THE COURT: Where is the evidence?

MR. PERSON: And I guess at this point it is in the -- the evidence would be in the log.

THE COURT: What is the evidence in the log?

MR. KAPLAN: On No. 315 the log just has no disposition.

On 320 it says "Cancelled," and the date is -- I can't quite make it out -- July 18, 1967.

MR. PERSON: It has a refund on July 18, 1967.

MR. KAPLAN: We are talking about two different things.

THE COURT: We are back on 315 now.

MR. KAPLAN: 315, there was no reflection of anything.

THE COURT: Then you have on 315 an indication of cancellation, and you say yes, and you refer to the deal folder. What does the deal folder show?

MR. KAPLAN: It is not in evidence.

THE COURT: I am going to just correct this and X out the indication of cancellation on 315. On your sheet check sent to customer 7/20/67. What is the evidence of that?

MR. PERSON: That was a deal folder entry, your Honor.

THE COURT: That is not in evidence, so we really have nothing.

Now, let's go to 320.

MR. KAPLAN: 320,the log says "Cancelled," and the date appears to be July 18, 1967.

THE COURT: Who cancelled?

MR. KAPLAN: It doesn't say, your Honor.

MR. KLEINBARD: That appears to be the same situation.

THE COURT: Except there is the word "Cancelled" in the log.

No. 326.

MR. KAPLAN: There is nothing in the log to reflect cancellation or delivery.

THE COURT: Mr. Person doesn't indicate on the sheet there is any explanation, so we will pass that.

MR. KAPLAN: 328 is the same.

THE COURT: Now, 328, Mr. Person has cancellation and reference to the deal folder, and is the deal folder in evidence?

MR. PERSON: No, it is not.

THE COURT: We have to X that out. Unless I am directed otherwise, I will X out all the things in 17 and 18, because apparently there is no evidence of this.

So we have 328, really no evidence. What about 334?

MR. KAPLAN: The same as 328 as far as the log is concerned.

THE COURT: Unless I am corrected, none of the information in Item 17 or 18 is in evidence, so I will X those out.

I think we have to pass Bates because we just don't have evidence.

MR. KLEINBARD: As to Pitcairn, they're outside the period.

We are now at Oldsmobile, your Honor.

As to Rosenstock --

THE COURT: Who brought up Pitcairn?

MR. KLEINBARD: Plaintiffs' 699. It's not in evidence.

THE COURT: Where does Pitcairn appear?

All right, let's pass it.

MR. KLEINBARD: The page is 33 and 35 of 699.

THE COURT: Is the transaction outside of the limitation?

MR. KLEINBARD: Yes.

THE COURT: Pass it.

MR. KLEINBARD: As to Rosenstock, that's 72 of 699, there is --

THE COURT: That's an Oldsmobile?

MR. KLEINBARD: Yes.

THE COURT: I think there is one reference?

MR. KLEINBARD: That's right, in May of '67, and we have no record of cancellation.

THE COURT: Mr. Person has a statement in 699, refusal to accept order, but what's the evidence of that? I don't recall any testimony at all about Rosenstock, and I'll assume, unless I'm corrected, there is no testimony, or anything to substantiate the claim of refusal to accept order.

Rosenstock did deliver some cars, in fact. I'm looking at these charts.

MR. KLEINBARD: I'm trying to find a possible reference, your Honor.

(Pause)

MR. KLEINBARD: On Rosenstock there is very brief reference on page 3260:

"Q During early 67 did you have any suppliers in the New York area for Oldsmobile?

"A Rosenstock.

"Q Did that source of supply terminate in '67?

"A Yes.

"Q What month approximately?

"A I would say it was in the spring, March or April."

That's all there is on Rosenstock.

On the other hand, as your Honor has mentioned in looking at the sheets of delivery of cars, they notonly delivered in the spring of '67 but they also delivered in the winter of '68.

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THE COURT: Let's pass Rosenstock.

MR. KLEINBARD: As to Paragon, as I stated before we went to lunch, we find no order in 699.

THE COURT: We can pass that.

MR. KLEINBARD: That finishes Oldsmobile.

On Buick we have Kutner Buick, which I think we discussed yesterday. That's the one where the car came in with oversized tires and the customer rejected it.

THE COURT: I'm a little behind you.

In your summary you have covered Chevrolets, Pontiacs, Oldsmobiles.

Start the Buick thing again.

MR. KLEINBARD: With Buick, at page 77 of 699, there was a reference to a car. I think we had some discussion yesterday about it. That car actually arrived in July of '67, but came in with oversized tires which the customer objected to and did not accept.

THE COURT: Where is the testimony about oversized tires?

MR. KLEINBARD: I think it's written in on 699.

THE COURT: It says oversized tires. I

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see that.

MR.KLEINBARD: There is no evidence. It's written in there.

THE COURT: Let me look at the overall Buick picture for a minute.

MR. KLEINBARD: There is only one other Buick, your Honor.

THE COURT: Go ahead.

MR. KLEINBARD: It's the next page, 78, Cunningham Buick.

I believe this was ordered beyond the period of time --

THE COURT: What is the order number?. 565?

MR. KLEINBARD: That's correct. That's beyond the period.

THE COURT: Let's keep it with this.

MR. KLEINBARD: So that we would not consider at this time.

In any event, while we aer on it, so we don't have to come back to it, that car was obtained from Bano Buick and delivered.

THE COURT: How about Cadillacs?

MR. KLEINBARD: Before I ccome to Cadillac,

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your Honor, I'm sorry for the changes but on the Rosenstock I see that the car deliveries which I mentioned in January and February of '68 got into the wrong column. You have deliveries from Rosenstock in April and May of '67, but you have no testimony except for the testimony I just read to your Honor.

THE COURT: What column should they go in?

MR. KLEINBARD: Into the Marty Motors column.

These exhibits were prepared in haste, your Honor. In any event they would be beyond the period we are discussing.

When we speak of Cadillacs we are talking about Colonial durig this period. Of the Colonial Cadillac orders, alleged orders, 11, I believe, are time barred.

THE COURT: How do you figure a time bar on Colonial Cadillac?

MR. KLEINBARD: These are too early. They were cancellation dates before December 10, 1966.

THE COURT: You say how many?

MR. KLEINBARD: I think 11.

THE COURT: What is the total number of problems we are dealing with on Colonial, the number of cars?

MR. KLEINBARD: 43 cars.

THE COURT: I'm not going to go through this car by car, but I will, subject to correction from Mr. Person, assume 11 were cancelled before December 10, 1966. That's what you are saying?

MR. KLEINBARD: That's right. That leaves 32. As to those, your Honor, there is Mr. Maiorana's testimony and the order log to support the plaintiffs' position. We of course take the position that the absence of any written orders for these cars, which would represent an expenditure I think in excess of a quarter of a million dollars, certainly is to be considered as to what inference is to be drawn. There is no testimony that this is connected in any way with General Motors.

As I say, I think there is a serious question as to whether these orders were ever placed. I cannot say as to this one there is a complete answer other than our non-involvement.

THE COURT: I'm going to assume, and I think this is right, that there was no testimony that General Motors influenced or communicated with Colonial.

MR. KLEINBARD: Mr. Murray so testified.

THE COURT: It was denied by Mr. Murray and certainly there is no evidence in the plaintiffs' favor on that point from Mr. Murray or Mrs. Hartsough.

The only thing would be circumstantial evidence, and what circumstantial evidence? Let's assume that the jury could find that the orders were placed and not filled, that 32 orders were placed and not filled within our damage period. I guess that's a piece of evidence in itself, and then you have this situation at Marty Motors.

There is a strict standard for dismissing.

MR. KLEINBARD: They're not identical. They're different facts.

THE COURT: Coulnd't you say there was circumstantial evidence in the fact that Colonial refused, if the jury could so find, and that Marty was billing the cars or putting title to the cars into the customers of Nabcor rather than into Nabcor, and that was being done as a subterfuge.

Perhaps you can get some kind of a jury case on the basis that this would all add up to efforts by Cadillac to stop its dealers from selling to Nabcor.

MR. KLEINBARD: As I said, I think it's

helpful to take it in the time periods in which we are now discussing rather than to take them by division, because you cross time lines in so doing. If we are talking about this period, your Honor, and since the plaintiff has suddenly moved to this theory, I think we have to talk about it for a moment: The actual refusals turn out to be very very few in number. I'm now talking about all the other divisions. So you are left with the only evidence that I would regard of any kind of consequence from which a jury might conceivably draw an inference as the Cadillac situation with Colonial.

As against that you have to weigh, it seems to me, the overwhelming evidence, both direct and circumstantial evidence , to the contrary.

In the first place, as we have said, there is no direct evidence of GM involvement, and on the circumstantial side certainly in the overall picture there is no inability to get cars generally. We have the improved financial situation of Nabcor as each year goes on.

They kept selling franchises, and even if they claimed for some reason the financial situation was impaired, which I don't think is borne out by their financial statement, as I said earlier the salesmen worked on commission, there was testimony as to loss of 13 brokers in 1966; but Plaintiffs' Exhibit 450 shows that two continued selling. I think one of those was Tedesco.

One never sold a GM car, and that was Cohen, and onesold out to another broker -- that was Tedesco.

In fact, only nine brokers were lost during this period and a much larger number came in the following year.

What I think we are doing -- and I think it's the perfectly appropriate thing to do -- is that by this intense dissection we have been going through for the last two days you lost sight of the overall picture, which is a business which is continuing to function. The reason that it does not do as well as it might do is due to any one ofany number of possibilities.

THE COURT: My understanding of the law, at least in the criminal field, you don't have to have complete success or any success at all to have the crime of conspiracy. In a civil case you have the question of damages. I'm not saying the things you bring up are not very very important, but I want to focus on this: Could there not be a conspiracy conducted by the Cadillac division?

Suppose you could find no evidence of a conspiracy at any kind of top management level of General Motors involving people who had control over all divisions? Let's suppose you could not find that? No jury could not find that.

Let's further say that no jury could ever find there was a conspiracy involving all divisions, division personnel getting together. Let's suppose further that no jury could ever find on this evidence that there was a conspiracy participated into within the division by Chevrolet or Pontiac or Oldsmobile or Buick.

With all that aside, could you still not have a conspiracy, even for a limited period of time, or limited time periods, between the Cadillac division and at least one dealer? I cannot ignore that question.

MR. KLEINBARD: I don't think you can, your Honor, and I don'tthink you can say that as a hypothetical proposition it is impossible to come to that conclusion if you were to isolate it from all the other evidence. But even within the Cadillac division at that very time period we are talking about, I see that, January '67, a Cadillac was ordered and delivered from Wayne Cadillac, or at least delivered in that period, and that later on, of course, when you alluded to Marty, whereas there is some testimony to the effect that the car was put in the customer's name, at least on occasion, there were several Cadillacs sold by Marty to Nabcor in Nabcor's name, at least until April of '68, which is two and a half years later, after the period we are now talking about.

THE COURT: This jumps ahead but --

MR. KLEINBARD: It helps.

THE COURT: I would like to pursue that. Go over that again with me.

MR. KLEINBARD: What I'm saying is that I don't have the date of the order but the delivery date of it, there was one Cadillac delivered in '67 by a dealer known as Wayne.

Then Marty Motors comes in the picture and starts delivering Cadillacs in Nabcor's name: Two in July of '67; one in March of '68; one in April of '68; and then one in July of '69.

There are one or two Cadillac orders from

Martywhich appear in the name of a customer. It appears to be an order retail sales. As to that there is a conflict of testimony.

THE COURT: What you said a moment ago was that through a certain period of time --

MR. KLEINBARD: April of '68.

THE COURT: In other words, you are contending that the evidence shows that the two Marty Motors Cadillacs in July of '67 and the two in March and April of '68 where title was put in Nabcor's name?

MR. KLEINBARD: That's correct.

THE COURT: What's the evidence of that?

MR. KAPLAN: It's in Defendants' Exhibit A9, page 46, the first one; page 47 is the second one.

THE COURT: One minute.

(Pause)

THE COURT: How does that show that title was in Nabcor's name?

MR. KAPLAN: It's in Nabcor's police book. There is a dealer invoice made out to Nabcor.

THE COURT: That's page 46.

MR. KAPLAN: Next you go to page 47 which also is a police book entry which shows that title went through Nabcor.

Then go to page 52, which is another one in April of 1968, a police book entry for Nabcor.

We are looking for the other two.

Did we give you page 51?

THE COURT: No.

MR. KAPLAN: That's another one.

THE COURT: That would take care of --

MR. KAPLAN: '67 and '68 transactions.

There is also, I think, a '69.

The one in 1969, page 56; but there is no police book entry so it's ambiguous.

But the Turco testimony, if your Honor recalls, was that this problem with Marty arose sometime in '68 or '69.

THE COURT: I'm now confused.

How many cars were there, Mr. Person? How many do you contend were sold by Marty and the title put in the name of Nabcor's customer, that is Cadillacs?

MR. PERSON: It would be Mr. Turco's testimony. I think he said 20, but I'm not sure.

THE COURT: Wouldn't that be in the log?

MR. PERSON: I don't know if it is in the log or not.

THE COURT: There are so few Cadillac orders reflected in the lob, except for the alleged Colonial orders, there are very, very few reflected in the log. I had an impression of a lot of orders of Cadillacs involving this title problem, but I can't find any chapter and verse on it.

(Continued on next page)

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T3 MR. KAPLAN: I think I have that. Turco's testimony is 2816 and was asked how many times it happened, and at first he said several times and then Mr. Person asked him again, and he said about 20 times, 10 or 20 times.

But the only documents that came in related to one or two transactions. That was Plaintiffs' Exhibit 678, if I remember correctly.

THE COURT: How many, one or two?

MR. KAPLAN: The only one I am aware of is Plaintiffs' Exhibit 687, which is one.

THE COURT: I think tomorrow, Mr. Person, I want to know the extent of this title problem with Marty, and I don't understand how there would be 10 or 20 orders covered by Marty with title placed in the name of the customer and not reflected in some document. I would think those would go through the Nabcor log, wouldn't they?

MR. KAPLAN: The only testimony on that is that Turco said they didn't go through the police book because they didn't take title, but I can only surmise as to anything else.

Presumably in the case of a transaction involving Plaintiffs' 678, there was other documentation, for example, purchase orders or copies of a draft, and things of that nature.

THE COURT: Did the Turco orders go through the Nabcor log, Mr. Person?

MR. PERSON: It is difficult to tell.

THE COURT: I thought you stipulated by and large that Turco's orders are reflected in the log.

MR. PERSON: I think that we always, at least at the very outset we said something about except as to the hidden title problem.

THE COURT: Why would that have anything to do with being in the log? If the order was placed with Nabcor for a car it would go in the log, regardless of whether the title was ultimately given to somebody else, it would seem to me. It is an order to be reflected in the log.

MR. PERSON: We do have 10816, Exhibit 656 is in the log, an order dated October 16, 1967.

MR. KAPLAN: Plaintiffs' Exhibit 656 is not in evidence.

MR. PERSON: It isn't?

MR. KAPLAN: Not according to my notes. It may be, but I am not sure.

THE COURT: What is the log entry you are

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talking about, because I have a copy of the log?

MR. PERSON: Broker 108-16, page 30052, line 24.

THE COURT: That simply says Alf-Lex Auto Sales, Cadillac Fleetwood, Marty Motors, and that is a 1968 Cadillac.

What does that tell me?

MR. KAPLAN: The other side of the page, your Honor, it is a double-ledger page, so on the next page, 30051, I believe.

MR. PERSON: I have the invoice from Marty Motors, and it ties in with the serial number. This is the Nabcor order form to Marty Motors containing an entry of the last six digits of the motor vehicle number, and I have a copy of the registration made out from Marty Motors to Ship Tank in evidence, 657, with the same motor vehicle number.

THE COURT: You believe this traces it to this Alf-Lex matter that we have in the log, right?

MR. PERSON: Correct, your Honor.

THE COURT: Are the documents in evidence?

MR. PERSON: Yes, your Honor.

THE COURT: Have you got any other documented instances of that?

MR. PERSON: 10171, that is a transaction --

THE COURT: Can I go back to the Alf-Lex transaction? When was that?

MR. PERSON: That occurred -- the date of the sale is March 11, 1968.

THE COURT: To whom?

MR. PERSON:Marty to Ship Tank.

2 MR. KAPLAN: We made a rather interesting discovery. The Nabcor police books says Nabcor took title to this very car with the same serial number.

THE COURT: Let's finish up. Let's call this the Alf-Lex transaction. What does the log show, the police book?

MR. KAPLAN: I am double-checking. It passed through the Nabcor police book and it is the same serial number as the car in Plaintiffs' Exhibit 657.

Page 51 of Plaintiffs' Exhibit 452, which is one of the police books, it shows that Nabcor purchased this car, the same serial number, from Marty Motors and then Nabcor itself issued an MV-50.

THE COURT: What do you say to that, Mr. Person?

MR. PERSON: First of all, I had this prepared myself in order to update the police book to show as

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many transactions as we had made, so the computer picked it up, and it may be in the original entry that was mine, which I had my personnel make from this record, believe it or not, since it ties in to the same motor vehicle number, U-351029, which shows title going from Marty Motors to Ship Tank.

That appears on this entry made in my office, but only to try to create a full record of the transaction. It was drawn from this document and it doesn't mean that the title went to Nabcor, only to show Nabcor purchased a car, and it was done in my office, and it is a sheet that was just prepared.

THE COURT: Let me see the police book. Is this something the dog chewed up?

MR. KLEINBARD: No, this is Turco's dog.

MR. PERSON: It was prepared to make sure we had all the documents reflected, as many as we could.

THE COURT: I would like to see the original police book, if I may.

MR. PERSON: Here is the documents that relate to that. These sheets were sheets prepared in our office. It doesn't appear in the police book in that sense.

THE COURT: Where is it?

MR. PERSON: That would be March 8, 1968, or Marh 11, 1968, in the police book.

THE COURT: This would have been March 11 in this document which Mr. Person has handed me which has on its cover 451 for identification. There is no entry, apparently, for that March 11 transaction, but what is the status of 451 for identification? Was it received in evidence?

MR. KAPLAN: I thought it was.

THE COURT: Do we agree that it is in evidence or what?

MR. PERSON: We worked on it and it would have to be.

MR. KAPLAN: I think it is.

THE COURT: Let's assume that. I will mark it with the red marking.

Now, where did you get your information, Mr. Kaplan?

MR. KAPLAN: Page 51 of Plaintiffs' Exhibit 452.

MR. PERSON: These are records we got from the client, and this was picked up as the result of that, 657 was picked up and entered as a transaction.

THE COURT: In other words, this 452 is

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partly an original record and partly something made up by your office?

MR. PERSON: Correct, to try to make sure --

THE COURT: Let's get the status.

MR. PERSON: That is correct.

THE COURT: Where is the entry, what part is made up? We have a sort of looseleaf supplement that was made by your office?

MR. PERSON: Correct, not by the client but made up --

THE COURT: Where is this transaction? I guess page 51, and the other side of it.

It has 3/11/68 -- a lot of these entries are for Walter Schultz.

MR. PERSON: That is a Nabcor broker.

THE COURT: Some other entries are for Nabcor East New York.

MR. PERSON: There is no chronology, only a collection of transactions that escaped being entered in the police book for whatever reason.

THE COURT: What do you take it to mean?

MR. KAPLAN: To mean that Nabcor bought it and that says "Purchased by Marty Motors and sold to Ship Tank Service Corporation."

MR. PERSON: This is the record upon which that entry is based.

THE COURT: Namely, 657.

MR. PERSON: That ties in with the number over here.

THE COURT: Are we going to get into a problem like this again?

MR. PERSON: I doubt it, unless there is one other transaction picked up.

THE COURT: What do you suggest, Mr. Kaplan?

MR. KAPLAN: What I suggest is this: I think that as far as documents in evidence are concerned, even if we take all of the assumptions most favorable to plaintiffs, there aren't more than two cars where Marty titled them in the customer.

THE COURT: If you include this one?

MR. KAPLAN: Including this one. This is 1968 and later, am I right?

MR. PERSON: I would have to check, but that sounds accurate.

THE COURT: We will say that as far as the documents, two cars, 1968 and later, titled Mary to customer. I think we have done all we can on that.

MR. PERSON: There was no attempt to offer every document that we had relating to this. We had testimony and statements and I believe that is also reflected that we offered some in evidence. You had not allowed me to offer --

THE COURT: What documents?

MR. PERSON: Relating to cars.

THE COURT: There were general statements. I am talking about business records of title.

MR. PERSON: What I offered were some additional ones such as at the time after Mr. Ripperger left the stand.

THE COURT: Did you subpoena documents from Marty Motors?

MR. PERSON: They were all produced earlier in the suit.

THE COURT: Had you taken their deposition earlier?

MR. PERSON: No, but there was no document showing hidden title.

THE COURT: Don't they have invoices to people?

MR. KAPLAN: Marty Motors didn't show anything.

MR. PERSON: They never produced those deals to us that we had some evidence of.

THE COURT: Didn't Turco have some records?

MR. PERSON: We have some.

THE COURT: I don't remember, is this Turco situation a situation where the records were incomplete or destroyed or stolen? I am not accusing you or suggesting you were putting down misleading entries. It just presented a temporary problem and there is no issue about that, Mr. Person.

Thank you for calling it to our attention.

But I want to ask you about the Turco records.

MR. KAPLAN: Exhibit 451 was not in evidence.

MR. PERSON: All of this is in evidence, anyway.

THE COURT: Do you want to stipulate it as a basis for information?

MR. PERSON: It was used in the computer.

THE COURT: I would admit it right now.

xx (Plaintiffs' Exhibit 451 for identification received in evidence.)

THE COURT: I just want to take a minute, Mr. Person, because I don't recall.

Did Turco have records of his orders or was this a situation where the records were lost,destroyed, stolen or something?

MR. PERSON: No. We had a collection of records that did not wind up in the ordinary course of business through his police book because of the hidden title factor.

THE COURT: The police book isn't the only record. If Turco placed an order with Marty, would he not --

MR. PERSON: He had no log.

THE COURT: What about the documents that you have there, that yellow document?

3 MR. PERSON: We did have similar yellow documents that were offered in evidence. I offered about three or four transactions after Ripperger left the stand, and you were critical of me then, and subsequently said that you were wrong for being critical, but you thought that I was trying belatedly to confront Mr.Ripperger with something to impeach him after he left, when all I wanted to do was show these were additional evidences of hiding title. It had nothing to do with the credibility of Mr. Ripperger, but we did have about three or four others that we offered.

THE COURT: Let's say just as an offer of proof, let's suppose we deal with it that way. What records do you have of Turco of orders to Marty for Cadillacs? Do you have purchase orders or forms like 656 or any other records of Turco orders to Marty for Cadillacs?

MR. PERSON: Well, the only ones that I would be talking about now are ones not reflected in the evidence at this time.

THE COURT: And the ones reflected in the evidence at this time as far as Marty putting title in the customer directly, we say now it is only about two in 1968 and after.

MR. PERSON: We have others. I had at least three or four others that I offered.

THE COURT: Show them to me right now.

MR.PERSON: I don't have them now but I will try to go back and pick them up. They are in a folder.

THE COURT: Let's say three or four.

MR. PERSON: I believe three or four that were offered. I will submit them tomorrow.

MR. KAPLAN: I think relevant on the point, Turco testified at 2802 in dealing with Marty sometimes he ordered from Marty and sometimes he didn't.

MR. PERSON: They might be Nabcor, but through Turco.

THE COURT: I don't care who it is, I want the records you have relating to this title situation.

MR. KAPLAN: Plaintiffs' Exhibits 675 and 676.

THE COURT: I want to know what I am dealing with. I want to know whether I am dealing with potential evidence about two cars, four cars, 20 cars, and it makes a difference to me.

MR. PERSON: I thought there were three or four. Mr. Kaplan says there may be only two, so the range is between two and four.

THE COURT: You bring them in.

MR. PERSON: I will.

THE COURT: I would like to know the dates we are talking about. I will give this back to you, and that is about all we can do with Marty.

MR. PERSON: I have one here.

THE COURT: Get the complete batch, please, Mr. Person, get the complete batch, and when you are ready give it all to me.

MR. KLEINBARD: Just two things I would like to add to the Cadillac situation.

One, there are a series of Cadillac orders I think by Subaru that come in after the damage period, and the other point I want to make was that there would be on pages 81 through 90 of Plaintiffs' Exhibit 699, they are all barred.

THE COURT: Is there any testimony?

MR. KLEINBARD: You mentioned earlier that you were surprised at the relatively few number of Cadillacs, and I think there are two answers to it.

No. 1, there is a substantial number of Cadillacs that come before the damage period and a substantial number of Cadillacs that come after the damage period.

The second thing is that in their offering circular the plaintiffs make quite clear that of the limited production cars, which would include Cadillacs, Mark III or IV, whatever it was at the time, and Continentals or whatever, the Corvette type of cars, that altogether all of those included only 5 per cent of their car purchases. So it would not be extraordinary to find relatively few Cadillac orders.

What we have here is a bunching up at the beginning at the end and not too much in between.

I think on their own circular it is not extraordinary.

THE COURT: Is there any evidence about **ALF-LEX** situation for the sake of absolute abundance of caution? I think I would like to look at those sheets quickly on 699.

MR. KLEINBARD: In terms of evidence? I don't recall any testimony, your Honor.

THE COURT: I don't, either.

MR. KLEINBARD: I am told there is none, your Honor.

THE COURT: I got out Mr. Person's writeups from Exhibit 699 on those **ALF-LEX, Subaru and there is** simply no evidence about them even indicated by Mr. Person, so I will pass that.

MR. KLEINBARD: Again just parenthetically, we have the Cadillacs that he did get, Nabcor did get, which represent about 3 per cent of Nabcor's total orders, and that appears to correspond with the percentage of Cadillacs in the United States market altogether, which is 2 or 3 per cent.

THE COURT: On the 1970 you have five cars delivered, but I can't derive that from -- maybe I can. I guess that is right. Three Marty and two Burke.

MR. KLEINBARD: Certainly not consistent

with the divisional pattern.

THE COURT: I will release you from the late 1966 and early 1967.

MR. KLEINBARD: Now, I think we can move quickly hereafter, because now we are dealing with a time period when, with the exception of the Askew Corvette, Nabcor got every car they ordered. This, we are saying, is after the Spring of 1967. I think I remember saying after June 22, 1967, to be precise, and the dealers that we do have we do against a background of Nabcor getting every car.

The dealers, there is no competent evidence in the case of any of these dealers of direct GM involvement or any GM involvement. I am going to pass Bain Chevrolet, because that will be taken up by the Buffalo people, and I don't want to double-track on that.

The others are Byrne Chevrolet and Curry Chevrolet.

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THE COURT: What are you speaking of? In what context?

MR. KLEINBARD: In the context where they claim a cessation or refusal -- at least Turco claimed a refusal or cessation of a deal, and there is nothing on Plaintiffs' Exhibit 699 with respect to Byrne Chevrolet at all.

THE COURT: I don't even recall that from Anthony's testimony.

MR. KLEINBARD: It's Turco's testimony, but this is after the damage period.

THE COURT: Let's pass that then.

MR. KLEINBARD: Curry Chevrolet as '68 or '69.

THE COURT: What is the reference?

MR. KLEINBARD: Also Turco, 2825 and 2826.

THE COURT: I've got the reference. What do I make out of that?

MR. KLEINBARD: We don't make anything out of it. It's not in Plaintiffs' Exhibit 699. I mention it because it's testimony. I want to be sure I cover everything. Curry took the position that they had to have a fleet certificate.

THE COURT: There is more testimony. I

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had overlooked this. 2824, Mr. Turco -- this was impeachment testimony, I guess.

MR. KLEINBARD: Right.

THE COURT: I want to cover this. I want to make sure I understand the rule on this.

This testimony of Mr. Turco beginning at 2824, I guess it's really that statement:

"Q. Mr. Turco, during '68 or '69 did Mr. Ripperger tell you that Marty Motors would sell Oldsmobiles to Nabcor and that somebody had instructed Marty Motors not to sell Cadillacs to Nabcor and therefore if Nabcor purchased Cadillacs it would have to put it in the customer's name?

"A Yes, he did do that."

That question and answer, is that substantive evidence or simply impeachment?

MR. KLEINBARD: Only impeachment.

THE COURT: The Court of Appeals has moved around on that. I want to know whether that is substantive evidence.

MR. KAPLAN: We can check further, but I refer you to section 39 on McCormack on evidence. It says: Inconsistent statements of a witness and consistent statemenys, for that matter, are treated in

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this chapter on the assumption that they may be inadmissible as substantive evidence on the issues in the case under the traditional hearsay rule as administered in the majority of jurisdictions, and then it goes on to say obviously there are other jurisdictions, but I think that's in the federal rules.

I'll look further.

THE COURT: Both Mr. Kaplan and Mr. Person, you check. I have some memory of our Court of Appeals writing on that subject within the last few years, and I think it's quite important we make sure exactly what the latest ruling is on the use of that evidence.

I will assume for the moment, unless I'm told otherwise by Mr. Person or Mr. Kaplan, that it's strictly for impeachment and is not substantive evidence.

Now we come to this Curry thing again.

MR. KLEINBARD: There was a long discussion about fleet certificates, your Honor, and then at 230 Turco was asked whether in his conversation with Maiorana he related the discussions he had with Byrne about the fleet certificate and he said yes, and the same thing about Curry Chevrolet.

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THE COURT: This is kind of confusing. What isthe upshot? Somebody at Curry said he could not buy without a fleet certificate?

MR. KLEINBARD: He's describing a discussion he had withMr. Maiorana in which he said to Mr. Maiorrna that someone at Curry Chevrolet said he could not buy without a fleet certificate. We objected to that as not being binding on us.

THECOURT: Do you have anything else to say on that?

MR. KLEINBARD: That's all.

Marty we have covered.

THE COURT: When did the thing with Curry occur?

MR. KLEINBARD: It's '68 or '69.

THE COURT: Anything else?

MR. KLEINBARD: Not on that.

Now we discussed Marty; we discussed Rohrer.

I would now like to take one or two isolated places where there is some alleged GM involvement and dispose of those.

There is a little piece left of someone in the Cadillac showroom in Midtown Manhattan talking

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to Frank Maiorana over the telephone, and also Frank Maiorana is supposed to have spoken to this salesman's boss, as I recall, to the effect that they would be willing to sell him Cadillacs only in effect at retail prices, which Mr. Maiorana was not willing to pay.

There is no evidence that any of these employees were part of any conspiracy, and I think it's so peripheral and tangential that no inference can be drawn.

THE COURT: I would pass that.

MR. KLEINBARD: As to Cerota Chevrolet, I'm sure your Honor recalls the rather lengthy discussions we have had about it; this involves us with Mr. Morrison, who Mr. Maiorana says he spoke to in order to arrange for a drop shipment.

Mr. Morrison is supposed to have said that General Motors had to approve of drop shipments and that in a subsequent conversation said that he would deliver it to Cerota in Elmer, New Jersey.

THE COURT: When was this?

MR. KLEINBARD: In '69, your Honor.

Two comments about that: One, there is no evidence in the record that the car was ever ordered by Mr. Cerota for drop shipment. There is no document

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so stating.

Mr. Cerota denied, of course, he being the person with the most knowledge on the subject, that he had ever asked General Motors to drop ship the car for Shore Chevrolet up in Detroit, in the Detroit area.

Of course, Stolarski took the car, so even if you had some conceivable appropriate comment by Morrison that would be binding on General Motors about which we objected at the time there would be no injury --

THE COURT: Morrison never cut the car off?

MR. KLEINBARD: Stolarski got the car.

I think the last one of these tangential ones is Queen City Chevrolet, and there we have alleged testimony with a Jack Douglas of the New York zone office, supposedly. It was never established that there was such a perdon or that whoever he is, that his statements were made within the scope of his authority or scope of his employment as required by rule 801; he is supposed to have said to a Mr. Bonfield of Queen City Chevrolet out in Cincinnati not to deliver a particular truck, and he's also supposed to have made the comment about Nabcor not being authorized dealer and was bootlegging cars.

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The fact of the matter is that here, again, and there is no dispute about it, Nabcor got the car in question and two other cars.

Mr. Maiorana's testimony was inconsistent as to whether the first car he had ordered was a truck and the next two were passenger cars, or whether he first got the truck and then a passenger car and a truck.

But the bottom line is that there is no allegation even that Queen City refused to sell a car or truck, or that Nabcor ever attempted to place an additional order. That, combined with the unestablished identity of Mr. Jack Douglas, who is certainly a mystery man in this particular trial, as far as I am concerned, that supplies no basis for a conspiracy. Indeed, the first car was delivered within two or three days after this initial conversation. We had all that testimony about the draft and so forth.

So at this point I would just say briefly that, just to recapitulate, as I said in the beginning, there is clearly no evidence of corporate policy directed at Nabcor to destroy it or otherwise; that there is no evidence of direct General Motors involvement, and that the circumstantial evidence, such as it is, is of such insignificant nature as when taken in consideration with the ability to get cars both by way of testimonial admission and by virtue of documents, the handful of episodes taken together in 1966 to '67 don't permit an inference of conspiracy, and the isolated and sporadic incidents to which I have just referred simply do not rise to that dignity.

There are amply other inferences and more logical inferences, it seems to me, to be drawn, which brings me to the question of damages.

Your Honor, we had a lengthy --

THE COURT: I have to interrupt you. You went in a kind of summary fashion and maybe you are going to cover it now, but the question of the dropping off of brokers --

MR. KLEINBARD: I can do that right now.

In that period we were referring to a moment ago, the '66-67 period, Mr. Maiorana testified that Nabcor lost 13 brokers. Two of those brokers, Goldfeder and Tedesco, Augustine, actually continued placing orders with Nabcor subsequent to 1967, early 1967 and on in. Augustine, as a matter of fact, was one of the more substantial brokers.

One of them, Cohen, never ordered a General

Motors car during the damage period.

A fourth, Attainment, sold out to Tedesco who became Augustine.

So we are left with only nine brokers --

THE COURT: I think 13 -- I don't get that number. Let me try to get that testimony.

MR. KLEINBARD: It's basically at page 3277.

THE COURT: I'll go by my notes for the moment.

(Pause)

THE COURT: What is your list of the 13?

MR. KLEINBARD: Bente, Rizzuto, Soloff, Midland Management, Attainment --

THE COURT: Wait. I have Tedesco in there.

MR. KLEINBARD: He survives.

THE COURT: The list that Maiorana had certainly included Tedesco.

MR. KLEINBARD: It' Attainment-Tedesco.

THE COURT: After that was Midland Management.

MR. KLEINBARD: Right.

THE COURT: New York Auto.

MR. KLEINBARD: Right. Arctic Motors,

Goldfeder, Riccitelli, Skinner, Cohen.

THE COURT: Is Skinner Alf-Lex? My notes show Alf-Lex ceased doing business.

MR. KLEINBARD: I don't have that. I have Skinner at page 3283.

Both of these brokers, Skinner and Alf-Lex, continued past the period.

There was Skinner, Cohen and Vanderzee.

I think Alf-Lex was mentioned, but at page 3287 Mr. Maiorana was unable to recall approximately when the last order was received.

THE COURT: We will just pass that.

Is that it?

MR. KLEINBARD: That's it.

I have indicated before how we get from 13 to 9.

THE COURT: I guess I have 12 but we won't worry about that.

MR. KLEINBARD: I don't think it matters one more or less either way.

In 1967, 36 new brokers were added on, so you have a considerable greater number of brokers coming in than they lost.

THE COURT: You get this from X5?

MR. KLEINBARD: X5, correct.

There are 36 ordinary and four master brokers during that period, the calendar year 1967.

THE COURT: All right.

MR. KLEINBARD: I think that ends the situation insofar as loss of brokers is concerned.

THE COURT: He put on what in 1966?

MR. KLEINBARD: A total of 50.

THE COURT: If you say that in '66 he put on about 50, and if you cut out nine, or whatever the number was -- go ahead with your argument.

MR. KLEINBARD: 51, your Honor. You cut out nine and you add 36 ordinary brokers during 1967 and four master brokers.

THE COURT: I have that.

MR. KLEINBARD: I say from that you cannot form any conclusion that the business was destroyed because the brokers were being driven out of business or the brokers were giving up franchises.

THE COURT: Have you tried to match up this list with brokers referred to in Exhibit 699?

MR. KLEINBARD: The new ones?

THE COURT: My clerk has made a list of all the brokers referred to in 699. I think it would

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be good if you could make up a list of these brokers and see if they're feferred to in 699 and what dates, because I think there is some on this list of 12 or 13 that are not referred to at all. I don't think Bente is referred to, Soloff, and so forth.

MR. KLEINBARD: We'll have that for you tomorrow morning, your Honor.

Now to damages.

Unless your Honor directs me to, I don't feel there is any useful purpose being served, although I am prepared to do so, in discussing the plaintiffs' theory of damages which we went through that Sunday afternoon. I think it's well established that as a result of that, that there is no basis for the damage theory that was there expressed.

THE COURT: There were a lot of damage theories.

MR. KLEINBARD: But I don't think either the damages or amounts in theory could go to the jury.

If you would like me to go through the nine elements I could do that.

Basically they are, one, the loss of Mr. Maiorana's capital contribution.

THE COURT: Let's get that sheet out. We

might as well see what we have to deal with.

MR. KLEINBARD: I think that's Court Exhibit A.

THE COURT: I have got Court Exhibit A. You may proceed.

I think we have discussed this so thoroughly I would not --

MR. KLEINBARD: I don't think I can add anything except give your Honor one or two citations which we didn't give at that time and they relate primarily to this proposition, your Honor: That the franchise system or Nabcor was actually, in fact, the indirect target here in terms of loss of anticipated franchise income or even car income, and that there is no question, for example, that GM would have sold Nabcor had they been willing to register the cars in their own name or be a leasing and rental company or anything of that sort.

The object of the conspiracy here was merely to prevent them from distributing cars to their franchisees for sale and for disposing of them according to their overall franchise plan, and as such, the franchisees become the immediate target of the conspiracy, and when Nabcor is making purchases, it is as has been stated, it is making them as agent or broker for its franchisees. As such it would come under the line of cases illustrated by Billy Baxter against Coca Cola, and Nationwide Auto Appraisers Services. I can give you those situations in a second.

Billy Baxter against Coca Cola is 431 F. 2d 183, Cert. denied, 401 US 923.

THE COURT: What is the theory?

MR. KLEINBARD: The target of this alleged conspiracy, if there was a conspiracy, was directed against the ultimate franchisees who were the real purchasers of these cars.

THE COURT: I get your position but I really don't agree with that at all. I think that I would not pause on that.

MR. KLEINBARD: I want to get those situations into the record.

Nationwide Auto Appraisers Servicing against Association of Casualty & Surety Companies, 382 F. 2d 925.

In any event, as your Honor said, we discussed this, I think, really ad nauseam on that Sunday evening and there is really no basis for substantiating any of the damage figures that the plaintiff has outlined.

THE COURT: I would like to do this on damages: On the capital contribution of Frank Maiorana -- I'm now looking at Court Exhibit A, page 1, the capital contribution of Frank Maiorana -- I will pass.

MR. KLEINBARD: The loss of income as you correctly pointed out was income --

THE COURT: Pass item No. 2.

The loss of income from franchise sales net of selling expense which Nabcor would have had but for the alleged conspiracy in the years 1967 through '70, I guess we analyzed that.

MR. KLEINBARD: I think it's answered here --

THE COURT: I'm wondering about that.

In light of our discussion this morning I don't understand how anybody could calculate -- right now I literally don't understand how -- if I set out right now to calculate the loss to Nabcor from the inability to sell franchises, I don't know how I would calculate that becasue we have had the discussion of the refund provision. I don'tknow whether that idea was changed at some point.

Literally speaking, if Nabcor acquired an asset and was subject to refund it, that should have a bearing on damages.

I want to be realistic. I don't want to be playing around with something that is just a useless technicality, but I don't really think it is.

I think you better consider overnight, Mr. Person, if you are going to talk about any damages from the loss of franchise sales among the other problems, it seems to me, is how one would calculate it.

MR. KLEINBARD: Also, in that connection, your Honor, you may recall on Sunday night when we discussed this problem everybody started from the proposition that the conspiracy was to cut off the supply of automobiles, and plaintiffs' counsel proceeded on that occasion at page 1423, and that plaintiffs could not establish that any prospective franchise sales were called off because of a lack of supply of cars.

THE COURT: I think probably so much of that damage argument has been covered, you go ahead with whatever you feel you want to discuss.

MR. KLEINBARD: Let me say quickly, so I'm not deemed as to not have answered it, as to the $4 million figure lost auto sales, I think we established that Sunday night that was based exclusively on a multiplication of arbitrary figures, and it is totally inconsistent with the actual performance of the Nabcor brokers established during the relevant period.

THE COURT: I have not read that transcript.

MR. KLEINBARD: It was times an assumed total of cars that the brokers would have sold. It's totally inconsistent with the fact, for example, that the total number of orders received by Nabcor from all of its brokers averaged less than one order per broker per year; that more than 85 of their existing brokers didn't order as much as a single automobile,and so forth.

I don't want to belabor that point but I feel it's so obvious at this moment.

Both the Maioranas have admitted that whereas they had incidental difficulties they were always able to get all the cars they wanted.

Most important, your Honor, which was not stressed that night because we had not reached that particular point, there has been a complete failure of proof as to the sales effort, if any, made by the Nabcor brokers or any other facts which would permit the conclusion that Nabcor's brokers would have generated any greater volume of orders than they did; and it has been my observation in going through the list of brokers that the good brokers sold a lot of cars, people like Schultz and Turco and others, Augustine. I have to assume from that that they got out and hustled.

I have to assume from the fact that 85 brokers didn't put in so much as a single order that those brokers didn't overstrain, and absent evidence from the brokers of sufficient quantity and under sufficient general circumstances, I don't see how any conclusion can be drawn.

Your Honor may recall that the plaintiffs were given what I regard as a rather extraordinary privilege, that in the midst of the trial long after the witness lists were supposedly closed, your Honor permitted them the opportunity to bring in a number of brokers, and they were listed on the so-called final, final, final witness list, and not a single one of those people appeared, so that the only brokers with respect to which we have testimony are the plaintiffs, whose depositions were taken, and who remained in the case.

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THE COURT: Just a second.

MR. KLEINBARD: Surely.

Now, I don't think there is any point in my dwelling on the $20 million claim for loss of royalties on income on automobile sales.

THE COURT: I think you ought to have marked for identification that witness list.

MR. KLEINBARD: All right, your Honor.

THE COURT: We have referred to it and we can have that marked.

MR. KLEINBARD: I have it.

MR. PERSON: I object to the introduction of that.

THE COURT: Just have it marked for identification. It was referred to on the record.

MR. KAPLAN: Exhibit F-9.

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(Defendants' Exhibit F-9 marked for identification.)

MR. KLEINBARD: As I was saying, I see no point in going into the $20 million claim for loss of royalty income on automobile sales to be generated by brokers not yet in existence, in the light of what I already said about the brokers in existence, and the same thing would be true about the multi-million dollar

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claim for franchise sales to franchisees that were not yet contacted.

That takes me to Nabcor's claim for loss of profits of $178,920 on cars that Nabcor would have sold.

I regard that as insufficient in the light of plaintiffs' admissions that Nabcor was not in the business of making direct sales of automobiles. That is 1117 of the transcript and some succeeding pages, and it made only six such sales over the entite period of its history.

The loss of proceeds from the public offering, even if it were otherwise recoverable, which we would dispute, is barred because the damage period ends at December 10, 1970, and the public offering did not take place until 1971.

As to the Selina judgment, there is not a line of testimony in this record, your Honor.

And as to the claim for almost $600,000 for the so-called contingent liability of Nabcor in suits that may be brought, whether properly or improperly, and whether they win or lose, there is simply no foundation for that.

Now, that brings me to the last item that I wish to discuss, your Honor, and that is the eleventh hour damage claim that somehow delays had something to do with the damage here here.

In the first, place, I take exception to the use of the word "delay," because that is a color word. It is a time interval between when the order is placed by Nabcor with the dealer and delivery and that may be due to any one of many circumstances, as I read out of plaintiff's own manual the other day, having nothing to do with any incident to inflict harm on Nabcor or its franchisees.

There is nothing to show, for example, that similar delays were not experienced by other --

THE COURT: I will pass that.

MR. KLEINBARD: Finally, I think the bottom line is they got all the cars they listed in their so-called delay exhibit, and unless your Honor is interested, we have made a tentative analysis of some of the more aggravated delays charged, and there are alternate explanations on their face for a number of them. However, I don't see how you can turn it into dollars.

Although your Honor has permitted it, I think out of an abundance of caution I would just like to note for the record that I would of course object to the last-minute switch in theory.

That would end my presentation, your Honor. I think everybody must be tired of hearing from me by now. You have been very patient and if your Honor has no objection, we would like to have a two or three-minute recess.

THE COURT: Let's take a recess, and Mr. Kaplan is next.

(Recess.)

THE COURT: I think there ought to be marked for identification the group of charts, again it is not evidence but I think it has been used, and I think they ought to have some formal marks so let's mark these as defendants' exhibits, please.

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(Defendants' Exhibits G-9 through K-9 marked for identification.)

MR. KAPLAN: If I may, your Honor, I will take things a little bit out of order as they are on that agenda we gave you yesterday in the hope of getting through with Buffalo, so Mr. Watson can leave this evening.

I will start, however, with the claim brought by Mr. Young and move for a directed verdict to dismiss the complaint as far as brought by Mr. Young.

THE COURT: Motion granted.

MR. KAPLAN: I will go on to make the same motion with respect to Mr. Jamele.

THE COURT: Motion granted. I see no reason for any discussion whatever.

MR. PERSON: I would like to say that I annunciated a theory that they are entitled to services, and this is a property right. That will be a point on appeal, but this is a property right which would be interfered with.

THE COURT: I don't mean to cut you off from responding, and I will withdraw my rulings that I just announced if you wish to discuss Young and Jamele, but I really think, Mr. Person, that my memory is clear as far as Young, that hegot every car he wanted, he was a pretty active broker, and the problem that came up was that at one juncture in the course of a number of sales of cars which were completed, he got a car which didn't meet the model demands of the customer, and that led to a controversy which he settled.

I think that is about it, and I see no need in the middle of all the issues we have to discuss, but if you want to argue about Mr. Young tomorrow, I won't preclude you if you have anything to say on Mr. Young.

MR. PERSON: We can handle it now, and I just would say that as a franchisee he would have a right to receive support services from the franchisor, the franchisor was crippled and that prevented him from giving the support services, and the claim is that there was injury to these people as a result. At least, a loss of the value of their franchise, and I believe that is a matter which is supportable in law and a triable issue.

THE COURT: I think that that is not sufficient grounds. I think under the standards annunciated in the cases with which you are familiar and Mr. Kleinbard really stated at the beginning, I think that the motion to dismiss as to the plaintiff Young should be granted, and there is a short statement as to the claim of Ralph Ajello made on behalf of the deceased Jamele, and I believe the Jamele testimony was -- the deposition testimony was summarized, and without further discussion is sufficient grounds for dismissal of the case as to Ajello brought on behalf of Jamele.

Now, let us proceed.

MR. KAPLAN: I would also at this time move for a directed verdict dismissing the claims brought on behalf of Frank and Anthony Maiorana personally.

In the statement of plaintiffs' claim, Court Exhibit A, which we discussed that Sunday night, it was made clear that there were one and perhaps two elements to the individual damage claims of these gentlemen.

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The first is, they claim they didn't get the salary they would otherwise have received from Nabcor, and I think that, first of all, there is absolutely no proof in the record of any causation; that is, assuming there was this conspiracy and all of that, there is no proof they would have been paid more or should have been paid more or by what amount.

But passing the question of proof, I think that it is perfectly well established in this Circuit that any shareholder or employee of a corporation has standing to sue under the Clayton Act for injuries of this nature where the claim is that the corporation was injured and did not do right by the employee. I would cite on this point the Long Island Lighting v. Standard Oil of California decided by the Court of Appeals in 1975, reported at 521, Fed. 2d, 1269, and there is a long line of such decisions in this Circuit.

THE COURT: Do you claim there is standing?

MR. PERSON: Yes.

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THE COURT: Have you looked at these cases?

MR. PERSON: No. There is a property interest --

THE COURT: This is not a matter of just sort of our initial view of the thing. There is case law and it is very clearcut, and I will give you an opportunity overnight to check those cases. But I think you better come back, if you are going to oppose this on the standing point with chapter and verse as far as the law, because I think that is right what Mr. Kaplan says, but you better check those cases.

Let's pass the Anthony and Frank Maiorana matter.

MR. KAPLAN: Only one other sentence I would add, and that is the other branch of plaintiffs' claim seems to be that the Maioranas are entitled to some proportion of any recovery by Nabcor on the theory they sold in the public offering or had their percentage of their ownership interest in Nabcor reduced by virtue of the public offering. I think as a matter of law there would be no such entitlement to recover anything, but the public offering was in 1971, and is outside the damage period. I think I need say no more about that.

At this point I will go on to Buffalo in the hopes of permitting Mr. Watson to reach his material tonight.

I move for a directed verdict dismissing the complaint as to Mr. Strimple individually and General Auto Sales & Leasing as a corporation.

I think, first of all, there is absolutely no evidence to support any claim by Mr. Strimple individually, and I will say no more about that. There is just no proof that anybody did anything to him or he suffered any damage in his individual capacity.

THE COURT: Again you have the standing question, and we will pass that until tomorrow morning.

MR.KAPLAN: I understand the claim to be and I suppose the only possible claim that Strimple, while he was an individual proprietorship and before the incorporation of General Auto Sales, was operating up in Buffalo --

THE COURT: I don't think that has ever been articulated. I think we will take care of that with the individual claims of Frank and Anthony Maiorana after we give Mr. Strimple an opportunity to discuss the standing point.

MR. KAPLAN: I will go on to General Auto Sales and make this motion.

I think to begin discussing the Buffalo situation, it is very important to place it all in chronological context and the context of what happened up there.

First of all, chronologically, if there was any problem at all in Buffalo, and we say there is not, it happened between September 21, 1967, and February 1, 1968.

September 21 was the day Mr. Strimple testified he took an order from his daughter for an automobile and, according to the testimony of Mr. Strimple, he did nothing prior to that date to start his business in Buffalo.

The February 1 date is the date on which it is stipulated Mr. Strimple visited the United States Attorney in Buffalo, and Mr. Strimple testified that from that day forward, and the record will show from at least some time before that date, he got all the cars he wanted in Buffalo. So we are dealing with at the outset this four-and-a-half-month period.

THE COURT: Do you have any problem about Multi-Make?

MR. KAPLAN: No, because of a number of factors. Multi-Make is not a plaintiff in this case,